St v Hopkins
196 Wis. 2d 36
(Ct. App. 1995)

8) If Def fails at sentencing to object to restitution indicated in PSI, Ct may order such restitution to be paid

§ 973.20(14)

9) Procedural rules

a. Parties in interest have right to be heard, present evidence, and cross-examine witnesses

St v Dziuba
148 Wis. 2d 108 (1989)

b. No right to jury trial on amount of restitution

c. Ct, arbitrator, or referee may waive rules of practice, procedure, pleading, or evidence (except matter of privilege)

d. Discovery not available unless good cause shown

e. Def may participate by telephone under § 807.13

§ 973.20(13)(c)2.
St v Perry
181 Wis. 2d 43
(Ct. App. 1993)

f. 60-day restitution determination period is directory not mandatory

§ 973.20(13)(c)
St v Simonetto
2000 WI App 17
232 Wis. 2d 315

g. Maximum period that order for restitution may be held open is 90 days after imposition of sentence

§ 973.20(2), (3), (4), (5)

C. Losses that may be included in restitution order

St v Heyn
155 Wis. 2d 621 (1990)

1) Ct has broad authority to impose reasonable and appropriate restitution as condition of probation under § 973.09(1)(a), even if amount not an item of pecuniary loss, e.g., installation of burglar alarm system

§ 973.20(5)(a)
St v Anderson
215 Wis. 2d 673
(Ct. App. 1997)
St v Stowers
177 Wis. 2d 798
(Ct. App. 1993)

a. Limits restitution to special damages, construed broadly

§ 973.20(4m)

b. Includes cost of psychiatric and psychological care and services under certain circumstances

2) Property loss: Return of property or reasonable repair or replacement cost

St v Huntington
132 Wis. 2d 25
(Ct. App. 1986)

a. Def may be liable for full amount of theft even if received less than full amount from the theft

§ 973.20(2)(am)
St v Stone
2021 WI App 84
400 Wis. 2d 197
St v Kennedy
190 Wis. 2d 252
(Ct. App. 1994)

b. Reasonable repair or replacement cost not limited to fair market value of property at time stolen

St v Johnson
2005 WI App 201
287 Wis. 2d 381

c. Ct may consider victim's lost profits

St v Gibson
2012 WI App 103
344 Wis. 2d 220

d. Def may be liable for full amount of insurance claim paid (and for deductible) despite subsequent recovery of stolen car

3) Bodily injury: Necessary medical and related services; cost of necessary physical and occupational rehabilitation; lost income; payments to ensure duties of victim/homemaker are continued until victim can resume duties

§ 973.20(4)

4) Death: Necessary funeral and related services under § 895.04

§ 973.20(5)(a)–(c)
St v Rouse
2002 WI App 107
254 Wis. 2d 761
St v Holmgren
229 Wis. 2d 358
(Ct. App. 1999)
St v Anderson
215 Wis. 2d 673
(Ct. App. 1997)
St v Handley
173 Wis. 2d 838
(Ct. App. 1993)

5) In all cases: Special but not general damages as in civil action; out-of-pocket expenses of victim; cost or rewards paid for information; lost income; actual Atty fees incurred in civil suit; investigative expenses

St v Brown
174 Wis. 2d 550
(Ct. App. 1993)

6) Tuition for victim

St v Muth
2020 WI 65
392 Wis. 2d 578

7) Victim's spouse's lost wages

D. Losses that may not be included in restitution

St v Lasecki
2020 WI App 36
392 Wis. 2d 807
St v Stowers
177 Wis. 2d 798
(Ct. App. 1993)

1) General damages to victim, i.e., nonpecuniary damages

St v Hufford
186 Wis. 2d 461
(Ct. App. 1994)

2) Interest

St v Lee
2008 WI App 185
314 Wis. 2d 764
St v Schmaling
198 Wis. 2d 756
(Ct. App. 1995)

3) Expenses incurred by non-victims

St v Torpen
2001 WI App 273
248 Wis. 2d 951

4) Outstanding restitution in unrelated cases

St v Oakley
2000 WI 37
234 Wis. 2d 528

5) Fines in unrelated cases

St v Storlie
2002 WI App 163
256 Wis. 2d 500

6) Collateral expenses incurred in normal course of law enforcement

§ 973.20(11)

E. Payment of restitution

1) Payment to DOC if Def sentenced to prison or placed on probation

§ 973.20(11)(c)

a. Ct shall require Def to authorize DOC to collect, from wages and Def's prison account, an amount or a percentage DOC determines is reasonable for payment to victims

2) Payment to Clerk of Ct if Def not placed on probation, not sentenced to prison

3) 5% surcharge on restitution for collection by either Clerk or DOC

§ 304.074(3m)

4) DOC may not collect supervision fee until restitution has been paid in full

§ 71.93(1)(a)7m.
§ 71.935

5) Restitution may be collected by tax intercept and state debt collection

§ 969.02(6)
§ 969.03(4)

6) Use bail for restitution and judgment

§ 973.20(12)

F. Form of order for restitution

1) Single order covering all payments and any amounts due under § 304.074

a. Fines

b. Costs

c. Fees

d. Surcharges

2) Order can be revised later to include costs for legal representation by private Atty under § 977.08 or fees due under § 304.074

St ex rel Bryson v Carr
2022 WI App 34
404 Wis. 2d 307
St ex rel Ortiz v Carr
2022 WI App 16
401 Wis. 2d 450

3) Ct may order deduction of percentage of prison wages and gifts during initial confinement for restitution and Ct fees

G. If ordered payments not made

§ 973.20(1r)

1) If Def not on probation, parole, or ES, restitution enforceable as a civil judgment or under Ch 785

2) If Def on probation

§ 973.09(3)(b)

a. Hold probation review hearing before probation expires

- Hearing may be waived

b. Extend probation or discontinue order if substantial reasons to do so

c. If probation not extended, issue judgment for unpaid restitution, unless victim has already recovered a judgment against Def

d. Send notice of civil judgment to Def at last-known address

§ 973.20(1r)

e. If probation not extended, restitution may be enforced as a civil judgment or under Ch 785

11. Judgment of Conviction

§ 972.13
RMC Form CR-204

A. Must be in writing and signed by clerk or Judge

B. Must set forth plea, verdict or finding, adjudication, sentence, and sentence credit

§ 973.08

C. Copy of judgment of conviction and order for restitution to accompany prisoner

1) Transcript of sentencing proceedings filed with institution within 120 days

D. Ct may submit "Sentenced Offender Report" with copy of "Judgment of Conviction" to provide DOC with sentencing information and recommendations on treatment needs of Def

RMC Form CR-233

12. Notice of Right to Appeal

§ 973.18
§ 809.30(1)(f)

A. Required by statute no matter what plea or sentence

St v Argiz
101 Wis. 2d 546 (1981)

B. Method

§ 973.18

1) Give Def two copies of appeal rights

2) Have Def sign and date acknowledgment that Def

a. Received copy

b. Read and understood copy

c. Discussed rights with defense Atty

3) Have Def's Atty certify in writing that rights discussed with Def

4) File copy in open Ct

5) Answer any questions by Def about appeal rights

13. Stay of Execution

§ 973.15(8)

A. Sentencing Ct may stay execution of sentence of imprisonment or to intensive sanctions program only

St v Szulczewski
216 Wis. 2d 495 (1998)
Weston v St
28 Wis. 2d 136 (1965)
Reinex v St
51 Wis. 152 (1881)

1) For legal cause, or

2) Under § 973.09(1)(a) for probation, or

3) For not more than 60 days, for any reason

a. Does not apply to 3rd and subsequent OWI convictions

§ 968.20

14. Return of Seized Property

§ 968.20(1), (1g)

A. Generally, person entitled to possession may petition for return of seized property if

1) No longer needed as evidence, or

2) Proceedings completed

§ 968.20(1m)

B. Dangerous weapon or ammunition

1) May not be returned to person who used it in crime

2) May be returned to owner to had no prior knowledge and did not consent to crime

18 USC 922(g)(9)
Leonard v St
2015 WI App 57
364 Wis. 2d 491

3) Firearm or ammunition may not be returned to person with a conviction for a misdemeanor crime of domestic violence

§ 968.20(1g)
St v Voshart
39 Wis. 2d 419 (1968)

C. Contraband may not be returned

§ 971.109

D. Ct may freeze or seize the assets of person charged with financial exploitation of elder person before conviction

15. Reconfinement

A. Is akin to sentencing

B. Recommendation: review PSI

St v Brown
2006 WI 131
298 Wis. 2d 37

C. Ct should consider and explain relevance of factors, including

1) Recommendation from DOC

2) Nature and severity of original offense

3) Institutional conduct record

4) Conduct and nature of violation of terms and conditions during ES

5) Amount of incarceration necessary to protect public

6) Minimum amount of confinement that is consistent with protection of public, gravity of the offense, and Def's rehabilitative needs

7) Prior record, attitude, capacity for rehabilitation, and rehabilitative goals to be accomplished

St v Hines
2007 WI App 39
300 Wis. 2d 485

D. Ct must permit allocution

E. Credit

§ 304.072
St v Presley
2006 WI App 82
292 Wis. 2d 734

1) Offender sentenced after revocation entitled to credit for time spent in custody until entering a prison

St v Obriecht
2015 WI 66
363 Wis. 2d 816

2) Sec. 302.11(7)(b) does not bar parolee sentenced after revocation from receiving credit for earlier time in custody

CR 38: OPTIONS FOR SENTENCING

1. Deferred Prosecution ..... CR 38-1
2. Expunction ..... CR 38-2
3. Fines ..... CR 38-4
4. Probation ..... CR 38-5
5. Electronic Monitoring ..... CR 38-12
6. Confinement ..... CR 38-12
7. Sex Offender Registry ..... CR 38-14

1. Deferred Prosecution

St v Wollenberg
2004 WI App 20
268 Wis. 2d 810

A. Deferred prosecution agreement and deferred entry of judgment are different

§ 971.37
St v Kaczmarski
2009 WI App 117
320 Wis. 2d 811

B. In enumerated battery and domestic and child sexual abuse cases, DA may have Def enter into written agreement with specified conditions for specified period

§ 971.37(3)

1) If agreement complied with, Ct must dismiss charge with prejudice

§ 971.37(2)

2) Agreement may be terminated upon written notice of Def or DA before expiration of specified period

§ 971.37(1m)(b)

C. Deferred prosecution agreement must be in writing signed by DA or designee and Def

§ 971.37(5)

D. Deferred prosecution agreements may be used for crimes other than those listed under § 971.37(1m)

E. Ct has discretion to hold case open on motion of DA for subsequent dismissal if conditions for doing so met

§ 971.37(4)

F. Consent to deferred prosecution or statements to deferred prosecution staff not admissible in evidence at later trial

§ 961.47(1)

G. Drug offenders

1) If first-time drug offender pleads or is found guilty of possession or attempted possession of controlled substance under § 961.41(3g), Ct may

   a. Without entering judgment and with consent of Def

   b. Defer prosecution

   c. Place Def on probation with terms and conditions

   d. Section 961.47(1) disposition not available in cases under § 961.41(3g)(e) possession of THC

St v Boyer
198 Wis. 2d 837
(Ct. App. 1995)

§ 961.47(1)

2) If Def violates terms or conditions, Ct may

   a. Enter adjudication of guilt and

   b. Proceed as otherwise provided

3) If Def fulfills terms, Ct must

   a. Discharge Def

   b. Dismiss proceedings

4) Discharge and dismissal NOT a conviction for a crime

§ 973.015

2. Expunction

Wis JI-Cr SM-36

A. Ct may order expunction of record of conviction of Class H felony or lesser offense upon completion of sentence if determines

1) Person under 25 at time of commission of offense, and

2) Person will benefit from expunction of record, and

3) Society will not be harmed

B. Expunction not available:

See § 973.015(1m)(a)3.

1) Certain Class H and Class I felonies excepted

Kenosha Cty v Frett
2014 WI App 127
359 Wis. 2d 246

2) Civil forfeiture conviction

§ 973.015(1m)(a)2.

C. Ct shall order at time of sentencing that the record be expunged upon successful completion of sentence if

1) Offense was violation of § 942.08(2)(b), (c), or (d) or (3) (Peeping Tom offenses), and

2) Person was under 18 when offense was committed

St v Hemp
2014 WI 129
359 Wis. 2d 320

§ 973.015(1m)(b)

D. Successful completion of probation (or imprisonment) entitles Def to expunction

1) Successful completion of probation is when

a. Probationer has not been convicted of subsequent offense

b. Probation has not been revoked

St v Lickes
2021 WI 60
397 Wis. 2d 586

c. Probationer has satisfied the conditions of probation established by the Ct and DOC

§ 973.015(1m)(b)

2) Detaining or probation authority must forward certificate of discharge to Ct

St v Ozuna
2017 WI 64, ¶ 14
376 Wis. 2d 1

3) Ct may independently review whether probation successfully completed

SCR 72.06

E. To expunge Ct record, Clerk of Ct must remove any paper index and nonfinancial Ct record and place in case file; electronically remove any automated nonfinancial record, except case number; seal entire case file; and keep for retention period appropriate for case type

St v Anderson
160 Wis. 2d 435
(Ct. App. 1991)

1) Expunged conviction may not later be used for impeachment

St v Leitner
2002 WI 77
253 Wis. 2d 449

F. Expunged record is only Ct record, not DA or police record

St v Meinhardt
2012 WI App 82
343 Wis. 2d 588
see also 2009 Wis Act 28,
§§ 3384–3386, 9309, 9400

G. 2009 amendment of § 973.015 applies only for sentences ordered on and after July 1, 2009

St v Matasek
2014 WI 27
353 Wis. 2d 601

See St v Arberry
2018 WI 7, ¶ 16 & n8
379 Wis. 2d 254

H. Ct may grant expunction only at time of sentencing, not after review of performance of sentence

1) Failure to raise expunction at sentencing is not a new factor for a sentence modification

St v Allen
2017 WI 7
373 Wis. 2d 98

I. Effect of expunction: The sentencing Ct is prohibited from using the record of conviction itself to enhance a sentence; the expunged record of conviction cannot form the basis of repeater allegations; and the expunged record of conviction may not be used to impeach a witness on cross-examination

3. Fines

§ 973.05

A. Statutory provisions

1) Payable immediately, unless Ct grants period of time not to exceed 60 days to pay

§ 973.05(1m)

2) If restitution ordered, Ct may authorize payment period in excess of 60 days for all obligations, including restitution, fines, and related payments

§ 973.05(2)

3) Ct may make payment of fine a condition of probation

§ 973.05(3)

4) Portion or all of fine may be stayed for Def to perform community service

a. Ct may not stay statutory costs and surcharges

§ 973.07

5) If fine not paid, Def may be committed to Cty jail until fine, costs, and surcharges paid or Def discharged, but not to exceed 6 months

a. May not commit indigent Def

§ 969.03(4)
St v Iglesias
185 Wis. 2d 117 (1994)

St v Branch
2015 WI App 65
364 Wis. 2d 582

6) Fines and costs shall be paid out of bail money, after restitution, even if posted by someone else

a. Fines and costs may not be paid from money unassociated with crime

B. Criteria

Will v St
84 Wis. 2d 397 (1978)

1) Appropriate when incarceration or rehabilitation unnecessary

2) Appropriate when money deprivation may have deterrent effect

3) Def must have ability to pay fine set

St v Vesper
2018 WI App 31, ¶¶ 13–26, 382 Wis. 2d 207
St v Ramel
2007 WI App 271
306 Wis. 2d 654

4) Reasoning must be stated on record but need not be stated separately

C. Recommended procedure

Will v St
84 Wis. 2d 397 (1978)

1) Determine Def's ability to pay at time of sentencing

2) Provide for payment of fine in installments with sufficient time to pay

   a. Ct may give Def more than statutory 60 days to pay

   b. Def has burden to apply to Ct and prove inability to pay before fine due or commitment issued for nonpayment

3) Set alternative penalty for nonpayment of fine at time of sentencing

4. Probation

A. Criteria

See generally ABA Stds—Sentencing § 18-3.13 (1994)

§ 973.09(1)(c)

1) Not available if:

   a. Def convicted of Class A felony with penalty of life imprisonment, or

§ 973.09(1)(a)

   b. Probation is prohibited for a particular offense by statute

§ 939.616(1r)
St v Lalicata
2012 WI App 138
345 Wis. 2d 342

   - E.g., 1st-degree sexual assault of child under 12

St v Balgie
76 Wis. 2d 206 (1977)

2) Not permissible when Def is brought back into Ct for sentencing when probation revoked on withheld sentence

Bastian v St
54 Wis. 2d 240 (1972)

3) Probation decision should not turn on generalizations about types of offenses or existence of prior criminal record

St v Martin
100 Wis. 2d 326
(Ct. App. 1981)

a. Erroneous exercise of discretion for Ct to uniformly refuse to consider probation for certain offenses even though probation available sentencing alternative

b. Should be rooted in facts and circumstances of each case

Garski v St
75 Wis. 2d 62 (1977)

4) Ct should consider

a. Nature and circumstances of crime

b. History and character of offender

c. Availability of institutional and community services

St v Kuba
150 Wis. 2d 618
(Ct. App. 1989)

5) Ct may consider time necessary for Def to pay restitution

6) Whether Def pleads guilty or not guilty or intends to appeal not relevant to appropriateness of probation as a sentence

St v Oakley
2001 WI 103
245 Wis. 2d 447

7) Purpose is to rehabilitate and protect society without placing Def in prison

B. Two types of probation

§ 973.09(1)

1) Sentence withheld and Def placed on probation

2) Sentence imposed, but execution stayed and Def placed on probation

3) Difference is that upon revocation, imposed and stayed sentence will automatically go into effect without further Ct review

C. Length of probation

§ 973.09(2)

1) Misdemeanors

a. Not less than 6 months nor more than 2 years for the following:

- Misdemeanor that Def committed while possessing a firearm
- Misdemeanor that was act of domestic abuse, as defined in § 968.075(1)(a)
- Misdemeanor under § 940.225(3m) (4th-degree sexual assault) or Ch 948 (crime against child)

§ 973.09(2)(a)1.d.

- OWI-related misdemeanor under §§ 23.33(4c) or (4p)(e), 23.335(12)(a), (b), or (h), 30.681, 30.684(5), 350.101, 350.104(5), or 350.17, or misdemeanor under § 346.63 to which § 973.09(1)(d) applies

b. Not less than 6 months nor more than 1 year for Class A misdemeanors not covered under para. a. above

c. Not more than one year for misdemeanors not covered under paras. a. or b. above

§ 973.09(2)(a)2.

d. Maximum increased by:

- 1 year if there are 2–4 misdemeanor convictions at the same time
- 2 years if there are 5 or more

St v Reagles
177 Wis. 2d 168
(Ct. App. 1993)

e. Maximum misdemeanor probation term NOT increased by additional felony conviction

2) Felonies: Not less than 1 year nor more than maximum term of confinement in prison for offense or 3 years, whichever is greater

a. Up to 1 additional year of probation for each felony, if Def convicted of 2 or more crimes, including at least 1 felony

3) If convicted with a penalty enhancer (e.g., as a repeater)

§ 973.09(2)(b)
St v Wicks
168 Wis. 2d 703
(Ct. App. 1992)

a. If a felony, conviction of a penalty enhancer increases the maximum length of probation by an amount equal to the maximum length of the penalty enhancer

See § 973.09(2)(a)

b. If a misdemeanor, conviction of a penalty enhancer does not increase the maximum length of probation

4) May be consecutive to sentence of confinement

St v Gereaux
114 Wis. 2d 110
(Ct. App. 1983)

a. May not be consecutive to another term of probation

b. Ct may impose concurrent probation of greater length than prison sentence to avoid gap caused by revocation of parole before MR

St v Aytch
154 Wis. 2d 508
(Ct. App. 1990)

5) May be imposed concurrently with a prison term

§ 973.09(3)(a)
Huggett v St
83 Wis. 2d 790 (1978)

6) Ct may extend probation for cause and modify conditions before expiration

St ex rel Taylor v Linse
161 Wis. 2d 719
(Ct. App. 1991)

a. Ct may modify Ct-ordered and DOC-imposed conditions of probation

St v Gray
225 Wis. 2d 39 (1999)

b. Probation may also be modified before it begins

St v Luu
2009 WI App 91
319 Wis. 2d 778

c. Extension may exceed original limit

§ 973.09(3)(c)

7) Causes for extension of probation

a. Def has not made good-faith effort to discharge Ct-ordered payment obligations

b. Def cannot presently pay restitution and Def and person owed consent to community service in satisfaction of restitution ordered

c. Def stipulates to extension and Ct finds extension would serve purposes for which probation imposed

St v Davis
127 Wis. 2d 486 (1986)
St v Jackson
128 Wis. 2d 356 (1986)

8) Caution should be used in considering extension of probation for failure to pay full restitution; must consider Def's ability to pay

St v Dowdy
2010 WI App 158
330 Wis. 2d 444
aff'd, 2012 WI 12
338 Wis. 2d 565

9) Sec. 973.09(3)(a) does not grant Ct authority to reduce length of probation originally imposed

St ex rel Greer v Wiedenhoeft
2014 WI 19
353 Wis. 2d 307

10) Erroneous discharge certificate does not end probation

D. Conditions of probation

St v Kennedy
190 Wis. 2d 252
(Ct. App. 1994)
St v Hufford
186 Wis. 2d 461
(Ct. App. 1994)

1) Restitution

§ 973.09(4)

2) Confinement in Cty jail for not more than 1 year

St v Avila
192 Wis. 2d 870 (1995)
St v McClinton
195 Wis. 2d 344
(Ct. App. 1995)

a. Pretrial confinement as a result of inability to post cash bond not to be credited against jail time imposed as condition of probation

b. Time spent in prison before withdrawal of plea not to be credited against jail time imposed as condition of probation

St v Johnson
2005 WI App 202
287 Wis. 2d 313

c. Jail time as condition of probation in case A may be consecutive to same in case B *if* convictions at different times

St v Fearing
2000 WI App 229
239 Wis. 2d 105

3) Ct cannot permit probation agent to decide if period of confinement should be imposed

§ 973.09(7m)

4) Community service performed for public agency or nonprofit charitable organization

a. Hours may not exceed what would be reasonable given seriousness of offense and read-ins

b. Order for community service must be agreed to by Def and agency

§ 973.09(7m)(a)

c. Def reduces period of jail as condition of probation at rate of 1 day for each 3 days' work performed (8 hours of work per day)

§ 973.09(1g)

5) Payment of Atty fees and Ct costs

§ 973.09(1)(a)
see ABA Stds—
Sentencing § 18-3.13(d)
(1994)

6) Ct may also impose conditions that appear to be reasonable and appropriate, such as the following:

a. Cooperation with program of supervision

b. Meeting family responsibilities

c. Employment

d. Educational and vocational training

e. Medical or psychiatric treatment

f. Maintaining residence in prescribed area or special facility

g. Compliance with substance abuse treatment

St v Davis
2017 WI App 55
377 Wis. 2d 678

h. Sobriety

Ramaker v St
73 Wis. 2d 563 (1976)
St v Simonetto
2000 WI App 17
232 Wis. 2d 315

i. Prohibiting association with certain types of people or frequenting certain types of places

St v Carrizales
191 Wis. 2d 85
(Ct. App. 1995)

j. Requirement of admission of guilt as condition of treatment

St v Stewart
2006 WI App 67
291 Wis. 2d 480
St v Nienhardt
196 Wis. 2d 161
(Ct. App. 1995)

k. Geographical limits related to rehabilitation and protection of victims

St ex rel Kaminski v Schwarz
2001 WI 94
245 Wis. 2d 310

l. Requirement of reporting sex offender status to neighbors

§ 973.049

m. Ct may order no contact with any victim, witness, or co-actor

§ 973.049(3)

- In any case with a no-contact condition under § 973.049, Ct must include the prohibition in the judgment of conviction

St v King
2020 WI App 66
394 Wis. 2d 431

n. Restrict use of internet with specific conditions

§ 973.09(3)(a)
St v Williams-Holmes
2023 WI 49
408 Wis. 2d 1
St v Gray
225 Wis. 2d 39, 66–69
(1999)

7) Ct may order review hearing to monitor Def's compliance with conditions and may modify conditions, including imposing jail time *and lifting no-contact restrictions*, only by following statutory modification process

St v Migliorino
150 Wis. 2d 513 (1989)

8) Def can refuse probation if finds conditions of probation more onerous than the sentence

§ 973.09(1)(a)
St v Rowan
2012 WI 60
341 Wis. 2d 281
see also Samson v Calif
126 S. Ct. 2193 (2006)
St v Oakley
2001 WI 103
245 Wis. 2d 447

9) Conditions of probation may impinge on constitutional rights as long as the conditions are not overly broad and are reasonably related to the person's rehabilitation

St v Oakley
2000 WI 37
234 Wis. 2d 528

a. May not include payment of fines due in other cases, if violation of condition exposes Def to incarceration in Cty jail for more than 6 months

St v Hoppe
2014 WI App 51
354 Wis. 2d 219

10) "No drive" condition may not exceed maximum period of revocation under Ch 343

§ 973.09(1)(d)
St v De Leon
171 Wis. 2d 200
(Ct. App. 1992)

11) Ct may place Def on probation when offense provides a mandatory or presumptive minimum period of one year or less of imprisonment, but must as a condition of probation, require that Def be confined for at least that mandatory or presumptive minimum period

St v McClinton
195 Wis. 2d 344
(Ct. App. 1995)

a. Def who receives conditional jail time equal to minimum mandatory sentence is entitled to good time credit

Prue v St
63 Wis. 2d 109 (1974)

b. Otherwise, good time for probation confinement within Ct's discretion

St v Oakley
2001 WI 103
245 Wis. 2d 447
St v Koenig
2003 WI App 12
259 Wis. 2d 833
Von Arx v Schwarz
185 Wis. 2d 645
(Ct. App. 1994)

12) Relevant condition may impinge on religious freedom, right to procreate, or social life

5. Electronic Monitoring

§ 302.425
St v Galecke
2005 WI App 172
285 Wis. 2d 691
St v Schell
2003 WI App 78
261 Wis. 2d 841

A. Sheriff may place prisoner on electronic monitoring equipment if available. Violation of separation of powers for Ct to prohibit electronic monitoring by sheriff

B. May also be used as condition of probation

St v Eastman
220 Wis. 2d 330
(Ct. App. 1998)

C. Electronic monitoring cannot be ordered by Ct in cases specifying mandatory minimum imprisonment

6. Confinement

Bastian v St
54 Wis. 2d 240 (1972)
St v Gallion
2004 WI 42, ¶ 25
270 Wis. 2d 535
see also ABA Stds—Sentencing § 18-6.4 (1994)

A. Criteria: Probation to be disposition, unless

1) Confinement necessary to protect public from further criminal activity of Def

2) Offender needs correctional treatment available only if confined (community rehabilitation services exhausted)

3) Undue depreciation of seriousness of crime if probation granted

St v Maron
214 Wis. 2d 384
(Ct. App. 1997)

4) Violation to impose sentence consecutive to probation or consecutive to jail time as condition of probation

§ 973.02

B. Where imprisoned if not specified by statute

1) Cty jail, if sentence less than 1 year

2) State prison, if sentence more than 1 year

3) Either Cty jail or State prison, if sentence 1 year

§ 973.03(2)

4) All time to be served in State prison, if sentenced to State prison and Cty jail or House of Correction on separate offenses

C. Parole eligibility

§ 973.014(1)(b)
St v Ambrose
181 Wis. 2d 234
(Ct. App. 1993)

1) Trial Ct may set parole eligibility date on 1st-degree intentional homicide

a. § 973.014(2) (now § 973.014(1)(b)) is constitutional

§ 973.014
St v Setagord
187 Wis. 2d 340
(Ct. App. 1994)

b. But Ct may not sentence Def to life without setting parole eligibility date

§ 973.014(1)(c)

- Unless offense committed 8/31/95 through 12/31/99

St v Setagord
211 Wis. 2d 397 (1997)

2) Ct may set parole eligibility date to occur after Def's life expectancy

St v Whiteside
205 Wis. 2d 685
(Ct. App. 1996)

3) In other cases, not improper exercise of discretion for Ct in appropriate case to recommend Def not be granted parole

D. Cty jail sentences

1) Confinement may be full time, or

§ 303.08
St v Ogden
199 Wis. 2d 566 (1996)

2) May grant "Huber law" privileges at time of sentencing or later on petition

§ 303.08(1)

a. Privilege of leaving jail during necessary and reasonable hours to seek employment, work, perform community service, conduct self-employment occupation, including housekeeping and attending needs of family, attending Ct proceedings in which Def is party or is subpoenaed as witness, attending school, obtaining medical treatment (including mental health counseling or therapy), attending parenting education program, or meeting with probation or parole officer

§ 303.08(10r)

b. If Def sentenced to jail subject to ignition interlock device (IID) order, may not be released unless, within 2 weeks after issuance of IID order, Def submits proof to sheriff that IID has been installed in each vehicle applicable to order

§ 973.03(3)

3) May order Def to perform community service work

§ 973.03(4)

4) May order, in lieu of imprisonment in Cty jail, Def to be detained at his/her place of residence and monitored by electronic surveillance

7. Sex Offender Registry

§ 973.048(2m)

A. Compliance with reporting under § 301.45 required

§ 940.22(2)

1) Sexual contact by therapist

§ 940.225(1), (2), or (3)

2) 1st-, 2nd-, or 3rd-degree sexual assault

§ 944.06

3) Incest

§ 948.02(1), (2)
§ 948.025

4) 1st-, 2nd-, or 3rd-degree sexual assault of child or repeated sexual assault of same child

§ 948.05, § 948.051

5) Sexual exploitation or trafficking of child

§ 948.055

6) Causing child to view or listen to sexual activity

§ 948.06

7) Incest with child

§ 948.07

8) Child enticement

§ 948.075

9) Using computer to facilitate child sex crime

§ 948.08 — 10) Soliciting child for prostitution

§ 948.085 — 11) Sexual assault of child in substitute care

§ 948.095 — 12) Sexual assault of child by school staff or volunteer

§ 948.11(2)(a) or (am) — 13) Exposing child to harmful materials

§ 948.12 — 14) Possession of child pornography

§ 948.13 — 15) Child sex offender working with children

§ 948.30 — 16) Abduction of another's child

§ 940.302(2)(a)1.b. — 17) Human trafficking for purpose of commercial sex act

§ 940.30, § 940.31 — 18) False imprisonment or kidnapping of minor who is not Def's child

§ 301.45(5)(b)1.
St v Rector
2023 WI 41
407 Wis. 2d 321

B. Multiple convictions from a single complaint and pled to in a single hearing constitute one "occasion" and do not require "lifetime sex offender registration"

§ 301.45(1m)

C. Compliance may be excused by Ct if Def was less than 19 years old and offense was nonforcible sexual assault with victim who was less than 4 years younger or less than 4 years older than Def

§ 973.048(1m)

D. If Ct finds conduct sexually motivated (§ 980.01(5)) and registration is in interest of public protection, compliance with reporting under § 301.45 may be required for violations of:

1) Ch 940

2) Ch 944

3) Ch 948

4) § 942.08

5) § 942.09 (Ct may order special disposition under § 973.048(1m)(b) for Def under 21 years old who has successfully completed sentence or probation)

6) §§ 943.01–943.15

St v Martel
2003 WI 70
262 Wis. 2d 483
St v Jackson
2012 WI App 76
343 Wis. 2d 602

E. Def must be convicted of qualifying offense. Dismissed or read-in offenses, by themselves, do not qualify

§ 301.45(2)(a)6m.
St v Jackson
2020 WI App 4
390 Wis. 2d 402

F. Required reporting by Def of all email accounts, blogs, or websites every year or within 10 days after changes does NOT violate 1st Amendment

§ 301.47(2)(a)
St v CG (Int of CG)
2022 WI 60
403 Wis. 2d 229

G. Prohibiting name change of Def, even if gender is changing, does NOT violate 1st Amendment

CR 39: MODIFICATION OF SENTENCE/ RESENTENCING

1. Time Constraints for Motion to Modify Sentence ..... CR 39-1
2. Motions Filed After Time Expires ..... CR 39-2
3. Grounds for Motion to Modify Sentence ..... CR 39-3
4. Standards of Review ..... CR 39-6
5. Resentencing ..... CR 39-7
6. Sentencing Adjustment—Truth in Sentencing ..... CR 39-9

1. Time Constraints for Motion to Modify Sentence

A. Motion under § 973.19

§ 973.19

1) Within 90 days after sentencing as matter of right

St v Nickel
2010 WI App 161
330 Wis. 2d 750

a. Applies to DNA surcharges

2) Mutually exclusive remedy to appeal or pursue postconviction remedies pursuant to § 809.30(2)

3) Decision must be made within 90 days

a. Ct may extend time for decision up to 90 days for cause

4) If decision not timely made

a. Motion deemed denied and clerk must immediately enter order denying motion

St v Scherreiks
153 Wis. 2d 510
(Ct. App. 1989)

b. Ct lacks competency to enter order denying motion for modification after time for deciding motion has expired

B. Ct has inherent power to amend, modify, and correct sentence within time limits set by statute or case law

Hayes v St
46 Wis. 2d 93 (1970)
overruled on other grounds by
St v Taylor
60 Wis. 2d 506 (1973)

1) Trial Ct has inherent power to correct certain sentencing errors at any time

St v Hungerford
76 Wis. 2d 171, 178 (1977)
St ex rel Copas v Burke
28 Wis. 2d 188 (1965)

St v Martin
121 Wis. 2d 670 (1985)

St v Prihoda
2000 WI 123
239 Wis. 2d 244

§ 973.13

Rosado v St
70 Wis. 2d 280 (1975)

St v Borst
181 Wis. 2d 118
(Ct. App. 1994)

St v Gruetzmacher
2004 WI 55
271 Wis. 2d 585
St v North
91 Wis. 2d 507
(Ct. App. 1979)

§ 973.09(3)(a), (d)
St v Schwind
2019 WI 48
386 Wis. 2d 526

2) Sentencing errors subject to correction include

a. Formal or clerical errors

- Must be corrected by Ct, not clerk

b. Illegal sentences

c. Sentences in excess of lawful maximum

d. Sentences based on impermissible factors

e. Failure to impose restitution

3) Limitations

a. Ct may not increase valid sentence if Def has legitimate expectation of finality

b. Ct has no inherent power to stay sentence, except to give effect to an appeal

c. Ct has no inherent authority to terminate or reduce length of probation originally imposed

2. Motions Filed After Time Expires

Cresci v St
89 Wis. 2d 495 (1979)
Krueger v St
86 Wis. 2d 435 (1979)
Klimas v St
75 Wis. 2d 244, 246
(1977)
Kutchera v St
69 Wis. 2d 534 (1975)

A. Statutory time constraints are regulatory, not jurisdictional

B. Ct has discretion to consider motion filed after statutory time constraints expire

Jones v St
70 Wis. 2d 62,72 (1975)

1) Ct must receive good reason for Def's delay in bringing motion

St v Hungerford
76 Wis. 2d 171 (1977)

2) Ct should consider motion if compelling circumstances exist for not bringing motion within required period

St v Noll
2002 WI App 273
258 Wis. 2d 573

C. Two time limits for filing motion for modification

1) Sec. 973.19(1)(a)—90 days after sentence imposed

§ 973.19(5)

a. Waives other relief

b. Filed if no other appeal being pursued

§ 809.30(2)(h)

2) Sec. 973.19(1)(b)—60 days after later of service of transcript or Circuit Ct case record

a. If other appellate issues pending

St v Nickel
2010 WI App 161
330 Wis. 2d 750

3) Time limits apply to postconviction motions attacking DNA surcharge

3. Grounds for Motion to Modify Sentence

St v Franklin
148 Wis. 2d 1 (1989)

A. General standards

1) Two-step procedure

a. Def must show new factor

- Burden of proof on Def by clear and convincing evidence
- Whether set of facts is "new factor" is question of law

St v Harbor
2011 WI 28, ¶ 33
333 Wis. 2d 53

b. If so, Ct determines whether new factor justifies modification of sentence

St v Harbor
2011 WI 28, ¶ 33
333 Wis. 2d 53

- Whether new factor warrants modification of sentence rests within Ct's discretion

St v Verstoppen
185 Wis. 2d 728
(Ct. App. 1994)

- Acquittal of charges that caused probation revocation and imposition of withheld sentence does not require Ct to modify sentence imposed

B. "New factor" defined

St v Harbor
2011 WI 28, ¶ 40
333 Wis. 2d 53
St v Hegwood
113 Wis. 2d 544, 546
(1983)
Cresci v St
89 Wis. 2d 495 (1979)
Rosado v St
70 Wis. 2d 280, 288
(1975)

1) Refers to fact or set of facts highly relevant to imposition of sentence, but not known to Trial Judge at time of original sentencing, because

   a. Factor not then in existence, or

   b. Factor in existence, but unknowingly overlooked by all parties

St v Franklin
148 Wis. 2d 1 (1989)

   c. If Ct relies on particular factor that later changes, Ct has power to protect own decree by modifying sentence

2) Proper new factors

Hayes v St
46 Wis. 2d 93 (1970)
overruled on other grounds by
60 Wis. 2d 506, 523
(1973)

   a. Ct finding it had been misinformed as to Def's past criminal record

St v Smet
186 Wis. 2d 24
(Ct. App. 1994)

- Mistake in sentencing guideline score attached to PSI (but not a mandate for modification)

St v Sepulveda
119 Wis. 2d 546 (1984)

   b. Denial of Def's admission to mental hospital when admission imposed as condition of probation

St v Ralph
156 Wis. 2d 433
(Ct. App. 1990)

   c. New information about accomplice's sentence

St v Verstoppen
185 Wis. 2d 728
(Ct. App. 1994)

   d. Acquittal of charges that resulted in revocation of probation and imposition of withheld sentence

St v Boyden
2012 WI App 38
340 Wis. 2d 155
St v Doe
2005 WI App 68
280 Wis. 2d 731

   e. Assistance to law enforcement if, for example, the fruits of the assistance are not known until after sentencing

3) Not new factors

St v Hegwood
113 Wis. 2d 544, 547–48
(1983)
Moore v St
83 Wis. 2d 285, 310
(1978)

§ 990.04

a. Legislative reduction of statutory maximum sentence, unless

- Prior criminal liability specifically and expressly remitted or abrogated by repealing statute

b. Prison record of progress

St v Machner
101 Wis. 2d 79, 82 (1981)
St v Champion
2002 WI App 267
258 Wis. 2d 781
St v Prince
147 Wis. 2d 134
(Ct. App. 1988)

- Rehabilitative progress in penal system related only to paroles and pardons and not to Ct's modification of sentence, even if sentence imposed under truth-in-sentencing legislation

St v Kluck
210 Wis. 2d 1 (1997)

- Post-sentence conduct while out on bail pending appeal not new factor

St v Harris
174 Wis. 2d 367
(Ct. App. 1993)
St v Prince
147 Wis. 2d 134
(Ct. App. 1988)

c. Def's change in attitude that increases chances for rehabilitation

St v Johnson
158 Wis. 2d 458
(Ct. App. 1990)

d. Change of heart of victim regarding proper punishment for Def

e. Change of heart of Judge upon reflection or after second thoughts

St v Machner
101 Wis. 2d 79 (1981)

f. Medical or special treatment needs

St v Gibbons
71 Wis. 2d 94, 98 (1976)
St v Lynch
105 Wis. 2d 164, 168–69
(Ct. App. 1981)

- Sentencing Ct has no jurisdiction to place conditions on prison sentence, or to order specific treatment such as psychiatric or psychological treatment

- Control over care of prisoners vested in DOC by § 301.03(2)

- Although prisoner entitled to treatment for "serious medical need," not a concern of Trial Judge at sentencing, rather a concern of custodial agency

St v Schladweiler
2009 WI App 177
322 Wis. 2d 642

g. DOC denial of bootcamp previously approved by Ct

St v Slagoski
2001 WI App 112
244 Wis. 2d 49

h. Postconviction expert opinion inconsistent with opinions rendered before conviction

St v Ninham
2011 WI 33, ¶¶ 87–93,
333 Wis. 2d 335
St v McDermott
2012 WI App 14, ¶¶ 16–
22, 339 Wis. 2d 316

i. Research on adolescent brain development

St v Sobonya
2015 WI App 86
365 Wis. 2d 559

j. Expert opinion based on known facts

See St v Arberry
2018 WI 7, ¶ 16 & n8
379 Wis. 2d 254

k. Failure to raise expunction at sentencing

St v Vesper
2018 WI App 31, ¶¶ 39–
41, 382 Wis. 2d 207

l. Duplicated sentence credit

St v Vesper
2018 WI App 31, ¶ 42
382 Wis. 2d 207

m. Reconfinement on a separate case

4. Standards of Review

Cresci v St
89 Wis. 2d 495, 504
(1979)
St v Wuensch
69 Wis. 2d 467 (1975)

A. On review of sentence previously imposed, Trial Ct should determine whether

1) Sentence unduly harsh and unconscionable, or

2) Sentence constituted erroneous exercise of discretion

St v CVC
153 Wis. 2d 145
(Ct. App. 1989)

a. Sentence excessive and unusual

b. Sentence so disproportionate to offense as to shock public sentiment and violate judgment of reasonable people regarding what is right and proper under circumstances

St v Wuensch
69 Wis. 2d 467, 478
(1975)

B. Ct may reduce sentence on basis that sentence constituted erroneous exercise of discretion

St v Magnuson
220 Wis. 2d 468
(Ct. App. 1998)

C. Judicial estoppel may bar Def from arguing that sentence Def agreed to is now excessive

St v Wuensch
69 Wis. 2d 467, 480
(1975)

D. Ct must state adequate grounds for finding sentence harsh and unconscionable

St v Ralph
156 Wis. 2d 433
(Ct. App. 1990)

1) Disparate sentence from similarly situated co-Def can support reduction on grounds of undue harshness or unconscionability

St v Babler
170 Wis. 2d 210
(Ct. App. 1992)

E. Eighth Amendment does not require strict proportionality between crime and sentence

1) Only forbids extreme sentences that are grossly disproportionate to the crime

5. Resentencing

St v Walker
117 Wis. 2d 579 (1984)

A. Appropriate when original sentence legally impermissible, unlawful, or not in accord with law

St v Holloway
202 Wis. 2d 694
(Ct. App. 1996)

1) When repeater component of sentence wrongly imposed is commuted, Ct may resentence if premise and goals of commuted sentence have been frustrated

St v Finley
2016 WI 63
370 Wis. 2d 402

2) But resentencing not remedy for incorrectly advising Def of maximum

St v Coffee
2020 WI 1
389 Wis. 2d 627
St v Travis
2013 WI 38
347 Wis. 2d 142
St v Tiepelman
2006 WI 66
291 Wis. 2d 179

B. Resentencing appropriate when Ct actually relied on inaccurate or improper information unless State proves error was harmless

St v Marcotte
2020 WI App 28
392 Wis. 2d 183
St v Goodson
2009 WI App 107
320 Wis. 2d 166

C. Resentencing appropriate when Def proves objective bias of sentencing Judge

St v Weigel
2022 WI App 48
404 Wis. 2d 488

D. Resentencing required when State's breach of plea agreement is material and substantial

St v Toliver
187 Wis. 2d 346
(Ct. App. 1994)

E. Not required when State fails to follow plea agreement that Def breached first

North Carolina v Pearce
89 SCt 2072 (1969)
St v Stubbendick
110 Wis. 2d 693, 697
(1983)

F. Ct must state reasons for modification of sentence

St v Wuensch
69 Wis. 2d 467, 480
(1975)

G. No sentence modification appropriate on mere reflection, when Ct reconsiders factors originally considered in imposing sentence

1) Unless Ct finds original sentence unduly harsh or unconscionable

St v Leonard
39 Wis. 2d 461 (1968)

2) Ct should distinguish between factors weighed in modifying sentence and factors weighed in original sentence

St v Robinson
2014 WI 35
354 Wis. 2d 351

H. May resentence when Ct promptly discovers its own error and acts before expectation of finality

St v Tarwid
147 Wis. 2d 95
(Ct. App. 1988)

I. Judge may impose more severe sentence only if justified by objective new factors

1) Objective identifiable factual data not known to Judge at original sentencing sufficient to overcome presumption of vindictiveness

2) Any leniency based on plea later withdrawn need not be extended at resentencing

3) More severe sentence may be based on knowledge obtained from intervening trial

St v Jones
2002 WI App 208
257 Wis. 2d 163

4) Sentence based on Def fraudulent representation may be voided and increased

St v Naydihor
2004 WI 43
270 Wis. 2d 585
St v Carter
208 Wis. 2d 142 (1997)

J. Ct may consider events and circumstances occurring since the original sentence

6. Sentencing Adjustment—Truth in Sentencing

NOTE: Sentences imposed before October 1, 2009, are treated differently than those imposed after October 1, 2009, per amendments made to § 973.195(1r) by 2009 Wis. Act 28.

NOTE: Between October 1, 2009, and August 3, 2011, inmates could earn positive adjustment time (PAT) under 2009 Wis. Act 28. The sentencing-related amendments in 2009 Wis. Act 28 were repealed by 2011 Wis. Act 38, effective August 3, 2011, but the provision of 2011 Wis. Act 38 that retroactively deprived an inmate of PAT that had been earned between October 1, 2009, and August 3, 2011, was ruled as an unconstitutional ex post facto law in *St ex rel Singh v Kemper*, 2016 WI 67, 371 Wis. 2d 127. An inmate who was eligible to earn PAT between October 1, 2009, and August 3, 2011, may again apply for early release. *See* Wis. Stat. § 973.198.

§ 973.195(1r)(a)
St v Anderson
2015 WI App 92
366 Wis. 2d 147

A. Available for Class C to I felonies and enhanced misdemeanors only

1) If multiple sentences, treat each individually

B. Time limits

§ 973.195(1g), (1r)(a)

1) Class C to E felonies—may apply after serving 85% of period of confinement

2) Class F to I felonies and enhanced misdemeanors—may apply after serving 75% of period of confinement

C. Grounds

§ 973.195(1r)(b)1.

1) Conduct, efforts at, and progress in rehabilitation, or participation and progress in education, treatment, or other correctional programs

§ 973.195(1r)(b)3.

2) Change in law or procedure related to sentencing or revocation of extended supervision effective after inmate was sentenced that would have resulted in shorter term of confinement in prison or, if inmate was returned to prison upon revocation of extended supervision, shorter period of confinement in prison upon revocation, if change had been applicable when inmate was sentenced

§ 973.195(1r)(b)4.

3) Inmate is subject to sentence of confinement in another State or inmate is in US illegally and may be deported

§ 973.195(1r)(b)5.

4) Adjustment is otherwise in the interests of justice

D. Ct responsibilities

§ 973.195(1r)(c)

1) Upon receipt, deny or hold petition for modification of sentence

2) If petition held for further consideration, notify DA

§ 973.195(1r)(d)

3) If DA does not object within 10 days and if crime is sexual offense under §§ 940.225(2) or (3), 948.02(2), 948.08, or 948.085, DA must notify victim

§ 973.195(1r)(f)
St v Stenklyft
2005 WI 71
281 Wis. 2d 484

4) Caution: Statutory language allowing victim or DA to "veto" petition is unconstitutional. Even if DA or victim objects, Ct must determine whether sentence adjustment is in the public interest. Ct shall make written findings

E. Adjustment

§ 973.195(1r)(g)1. & 2.

1) Ct may reduce term of confinement by amount of time remaining in term of confinement, less up to 30 days, and correspondingly increase extended supervision

§ 973.195(1r)(h)1. & 2.

2) If adjustment granted based on change of law, extended supervision may be shortened to conform to new maximum

CR 40: MOTION FOR A NEW TRIAL

1. Time Constraints for Motion ..... CR 40-2
2. Trial Court's Duty at Sentencing as to Postconviction Relief ..... CR 40-3
3. Appeal May Be Taken Without Filing of Postconviction Relief by Defendant ..... CR 40-4
4. Defendant's Right to Be Present at Motion Hearing ..... CR 40-4
5. Issue of Competency Raised When Postconviction Relief Sought ..... CR 40-5
6. Standards of Review for Motion Based on Claim of Error ..... CR 40-5
7. Motion Based on Claim of Newly Discovered Evidence ..... CR 40-9
8. Motion Based on Claim of Denial of Fair Trial ..... CR 40-11
9. Postconviction Discovery ..... CR 40-13
10. Granting New Trial in Interests of Justice ..... CR 40-14
11. Procedure When Transcripts Are Missing ..... CR 40-15

1. Time Constraints for Motion

§ 974.02
§ 809.30
§ 809.40

A. Chronology of time constraints

	Action	Aggregate Days
	Sentencing	Day 1
§ 809.30(2)(b)	Def to file Notice of Intent to pursue postconviction relief	Day 20
§ 809.30(2)(c) § 809.30(2)(d)	Clerk to send copies to appropriate parties; if Def requests SPD, DA may request indigency hearing**	Day 25
§ 809.30(2)(e)	Transcript and Circuit Ct case record must be requested by Def***	Day 50
§ 809.30(2)(f)	Transcript and Circuit Ct case record must be requested by SPD****	Day 56
§ 809.30(2)(g)	Reporter must file transcript with Ct and serve (deliver) copies to Atty (party) and Clerk must serve copy of Circuit Ct case record on Atty (party) within 60 days. (Reporter shall file with Circuit Ct transcript of postconviction hearing within 20 days after Def filing appeal or postconviction motion)	Day 110 Day 116
§ 809.30(2)(h)	Def to file notice of appeal or postconviction motion 60 days after the later of service of transcript or Circuit Ct case record. Notice of motion may not be filed with postconviction motion	Day 170 Day 176
§ 809.30(2)(i)	Unless extension requested by Def or Circuit Ct and granted by Ct of Appeals, Circuit Ct has 60 days after motion filed to decide motion by order; if no order filed timely, Clerk shall immediately enter order denying motion	Day 230 Day 236

** If indigency hearing requested, add 20 days to subsequent calculations

*** If Def has been denied representation by SPD, **add 60 days here and to subsequent calculations**

****If Def represented by SPD, time runs from point at which SPD receives material from Clerk

§ 974.02
§ 809.30
§ 809.40

1) Chronology printed in chart reflects statutory limits of time constraints under § 809.30

2) Actual time constraints for any particular proceeding depend on dates of contacts, service, and filings contemplated in statutes

§ 809.30(2)(i)

B. Absolute time limit for decision

1) Decision made within 60 days after filing of motion

2) If decision not made within 60 days, motion deemed denied

Clerk must immediately enter order denying motion

2. Trial Court's Duty at Sentencing as to Postconviction Relief

§ 973.18(2)

A. At time of sentencing, Ct must advise convicted Def of right to pursue postconviction relief

RMC Form CR-233

B. Contents of Ct's instruction advising Def of postconviction rights

1) Def has right to appeal conviction

2) Def has right to file postconviction motions

3) Def must file notice of intent to pursue postconviction relief within 20 days after sentencing

Whitmore v St
56 Wis. 2d 706 (1973)

4) Def's trial counsel obligated to continue representation, until

a. Decision whether to file postconviction relief made, and

b. Appellate counsel appointed for Def

§ 973.18(3)

5) Def and counsel directed to sign form to be entered in record

6) Trial counsel has responsibility for filing notice of intent to pursue postconviction relief

a. See § 809.30(2)(b) for contents of notice of intent to pursue postconviction relief

- RMC Form CR-233 not notice of intent to pursue postconviction relief

§ 809.30(2)(h)

3. Appeal May Be Taken Without Filing of Postconviction Relief by Defendant

§ 974.02(2)

A. Def not required to file postconviction motion before appeal if grounds are

1) Sufficiency of evidence, or

2) Issues previously raised

St v Monje
109 Wis. 2d 138 (1982)

B. Failure to make postconviction motion may waive issues on appeal

4. Defendant's Right to Be Present at Motion Hearing

§ 971.04(1)(d)
St v Hatch
144 Wis. 2d 810
(Ct. App. 1988)

A. When substantial issues of fact of which Def has personal knowledge, Ct should require Def's production at evidentiary hearing

St v Vennemann
180 Wis. 2d 81 (1993)

1) 2-prong test

a. Are there substantial issues of fact as to events in which Def participated?

b. Are those issues supported by more than mere allegations?

St v Vennemann
180 Wis. 2d 81 (1993)
see also St v Soto
2012 WI 93
343 Wis. 2d 43

B. Presence by way of telephone may not satisfy statute

St v McDonald
144 Wis. 2d 531 (1988)

C. Death of Def during pendency of postconviction proceeding

1) Appeal not mooted

2) Criminal proceedings not abated *ab initio*

5. Issue of Competency Raised When Postconviction Relief Sought

See **CR 12, Sec. 10**, this volume

6. Standards of Review for Motion Based on Claim of Error

St v Sarinske
91 Wis. 2d 14 (1979)
overruled on other grounds by St v Wayerski
2019 WI 11
385 Wis. 2d 344

A. Sufficiency of evidence to convict

St v Johnson
108 Wis. 2d 703, 705
(Ct. App. 1982)

1) Whether Ct satisfied that jury acting reasonably could be convinced, beyond reasonable doubt, by evidence jury accepted as true

Issue not whether Ct convinced of Def's guilt

St v Sarinske
91 Wis. 2d 14 (1979)
overruled on other grounds by St v Wayerski
2019 WI 11
385 Wis. 2d 344

2) Ct should sustain verdict when any credible evidence in any reasonable view supports verdict of jury

St v Johnson
108 Wis. 2d 703, 705
(Ct. App. 1982)

Weight of evidence and credibility of witnesses for trier of facts

Baldwin v St
59 Wis. 2d 116, 121–22
(1973)
St v Sarinske
91 Wis. 2d 14 (1979)
overruled on other grounds by St v Wayerski
2019 WI 11
385 Wis. 2d 344

3) New trial warranted only when

a. Evidence considered most favorably to State so insufficient in probative value and force that, as matter of law, trier of fact could not be convinced beyond reasonable doubt

St v Daniels
117 Wis. 2d 9
(Ct. App. 1983)

b. Reasonable doubt

- Proof beyond reasonable doubt need not exclude every possible doubt
- Moral certitude must exist based on convincing reason, excluding all doubt as to existence of different conclusions also based on reason

St v Daniels
117 Wis. 2d 9, 17
(Ct. App. 1983)

c. Incredible evidence

- Reviewing Ct may overrule fact-finder only when fact-finder relied on inherently or patently incredible evidence

St v Williamson
84 Wis. 2d 370 (1978)
St v Bergenthal
47 Wis. 2d 668, 677
(1970)

B. Errors of law on admission of evidence

St v Harper
57 Wis. 2d 543 (1973)

1) Review of stipulations

Stipulation binding when Def and counsel understandingly and willingly stipulated to admission in evidence of certain stolen property Def possessed when arrested

St v Alsteen
108 Wis. 2d 723 (1982)

2) Review of Trial Ct discretion on admission of evidence

a. Issue is whether Trial Ct exercised discretion appropriately

b. Record must show

- Discretion exercised, and
- Trial Ct's basis for exercising discretion

c. Criteria to determine whether admission reasonable and proper

- Whether any statutory basis exists for admission (or exception) to rule of evidence
- Whether any resulting prejudice outweighs probative value
- Whether admitted evidence relevant to real issue in case

St v Sarinske
91 Wis. 2d 14 (1979)
overruled on other grounds by St v Wayerski
2019 WI 11
385 Wis. 2d 344

C. Errors of law in jury instructions

St v Clausen
105 Wis. 2d 231, 240–41 (1982)

1) General rule

a. Trial Ct has wide discretion to select and supplement jury instructions

b. Review of jury instructions must be on case-by-case basis

St v Williamson
84 Wis. 2d 370 (1978)

2) Ct should not grant new trial, when

a. Ct gives jury instructions free of error and adequately covering law applicable to facts, and

b. Ct rejects request for other jury instructions free of error and adequate

- When Def claims error caused by denial of requested instruction, evidence must be viewed in light most favorable to Def

St v Dean
105 Wis. 2d 390
(Ct. App. 1981)

St v Harp
150 Wis. 2d 861
(Ct. App. 1989)

3) After jury excused, Ct may not order new trial solely because of unobjected-to instruction errors

Ct retains right to order new trial in interest of justice

4) Entire charge to jury is viewed

Barrera v St
109 Wis. 2d 324 (1982)

a. Standard of review is whether reasonable juror could have interpreted particular questioned instruction as shifting burden of persuasion on particular element of offense to Def

St v Giwosky
109 Wis. 2d 446 (1982)

b. Disjunctive instruction may be permitted with respect to alternate means or ways a crime may be committed

c. Limits of unanimity

St v Giwosky
109 Wis. 2d 446 (1982)

- When continuous course of conduct examined, unanimity in battery verdict requires only that Def intentionally committed act that caused bodily harm

- Verdict does not require unanimity on which act caused the harm

§ 805.13(3)
St v Dean
105 Wis. 2d 390
(Ct. App. 1981)

5) Atty's failure to object to jury instructions usually waiver of defect

a. Ct may review jury instruction if substantial rights of Def affected

St v Shah
134 Wis. 2d 246 (1986)

b. Even if defect waived by Atty's failure to object, Appellate Ct may exercise discretion to review jury instructions that "go to integrity of fact-finding" process

Schenk v St
51 Wis. 2d 600 (1971)

6) Atty's failure to request jury instruction bars claim Ct erred in failing to so instruct

7) Harmless error in improper jury instructions

St v Fencl
109 Wis. 2d 224, 238
(1982)

a. Constitutional error harmless beyond a reasonable doubt, if no reasonable possibility error might have contributed to conviction

St v Nye
100 Wis. 2d 398
(Ct. App. 1981)

b. Improper jury instruction harmless error (as to purpose of sexual arousal) when evidence could not be construed as undertaken for any other purpose

Chapman v California
87 S. Ct. 824 (1967)
Rudolph v St
78 Wis. 2d 435, 443
(1977)

c. Factors to determine whether constitutional error harmless

- Frequency of error
- Nature of State's evidence
- Nature of defense

St v Moriarty
107 Wis. 2d 622
(Ct. App. 1982)
St v Nye
100 Wis. 2d 398
(Ct. App. 1981)

d. Instructions that relieve State of proving every fact essential to crime not harmless

Roehl v St
77 Wis. 2d 398 (1977)
St v Kennedy
105 Wis. 2d 625
(Ct. App. 1981)

8) Admonitory instructions

Possible prejudice presumptively erased when admonitory instructions properly given by Ct

D. Error at prelim

St v Parr
182 Wis. 2d 349
(Ct. App. 1994)

Def who claims error occurred at prelim may only obtain relief before trial because error is cured by fair and errorless trial

7. Motion Based on Claim of Newly Discovered Evidence

St v Smith
125 Wis. 2d 11
(Ct. App. 1985), *rev'd*,
131 Wis. 2d 220 (1986)

A. To prevail on a claim of newly discovered evidence

St v McAlister
2018 WI 34, ¶ 31
380 Wis. 2d 684

1) Def must first prove by clear and convincing evidence that

a. Evidence was discovered after conviction

St v Watkins
2021 WI App 37
398 Wis. 2d 558

- Evidence must have existed before trial unless it resulted from developments in science and technology

b. Def was not negligent in seeking evidence

c. Evidence is material to an issue in the case, and

d. Evidence is not merely cumulative

St v McAlister
2018 WI 34, ¶ 33
380 Wis. 2d 684

2) If based on recantation, Def must show corroborating evidence consisting of

a. Feasible motive for initial false statement, and

b. Circumstantial guarantees of trustworthiness of recantation

Recommendation
St v Allen
2004 WI 106
274 Wis. 2d 568

3) Ct should review motion and determine whether each of these elements is sufficiently alleged before evidentiary hearing is required

B. If Def meets the burden, then

1) Ct must determine whether reasonable probability exists that different result would be reached in a trial

St v Avery
2013 WI 13
345 Wis. 2d 407
St v Plude
2008 WI 58
310 Wis. 2d 28
St v McCallum
208 Wis. 2d 463 (1997)
St v Edmunds
2008 WI App 33
308 Wis. 2d 374

2) Reasonable probability of a different outcome exists if there is a reasonable probability that a jury looking at the old and new evidence would have a reasonable doubt as to guilt

Vara v St
56 Wis. 2d 390 (1972)

C. Newly discovered evidence does not include newly discovered importance of evidence previously known and not used

St v Jackson
188 Wis. 2d 187
(Ct. App. 1994)

D. "Newly discovered evidence" should be distinguished from "newly available evidence" if it involves a co-Def's testimony and

1) Def aware of possible testimony before or at trial, and

2) Co-Def previously took the 5th

St v Avery
213 Wis. 2d 228
(Ct. App. 1997)

E. Burden of clear and convincing evidence rests with Def

Gelhaar v St
58 Wis. 2d 547 (1973)

8. Motion Based on Claim of Denial of Fair Trial

A. Improper remarks and questions of Attys

1) Trial fair if improper question stricken and Ct gives admonitory instruction to jury, provided

a. Question does not go to Def's guilt, and

b. Curative effect of Ct's admonition obviates possible prejudice, and

c. Strength of evidence of Def's guilt renders remark harmless beyond reasonable doubt

St v Williamson
84 Wis. 2d 370 (1978)

2) Prejudicial remarks of counsel or witnesses that do not go directly to issue of guilt must be considered in context of other facts of case, including

a. Curative effect of striking prejudicial remarks, and

b. Admonition to jury to disregard prejudicial remarks

St v Williamson
84 Wis. 2d 370 (1978)

3) Factual predicate

a. Failure of Atty to supply factual predicate to leading question of constitutional dimension only when

- Failure is prejudicial, and
- Failure denied Def fair trial

Doyle v Ohio
96 S. Ct. 2240 (1976)
St v Fencl
109 Wis. 2d 224 (1982)

4) Comment on Def's silence

a. Constitutional error to refer to Def's pre-arrest and pretrial silence to imply Def's guilt

5) Atty's strategy

McCoy v Louisiana
138 S. Ct. 1500 (2018)
St v Chambers
2021 WI 13
395 Wis. 2d 770

a. Decision whether to assert innocence to all charges and lesser included offenses is Def's alone

St v Tung
2023 WI App 33
408 Wis. 2d 544
pet for rev denied

Def must show Def expressly asserted objective to maintain innocence and Atty overrode objective by conceding guilt

St v Williamson
84 Wis. 2d 370 (1978)

b. Tainted remarks not error giving ground for new trial when counsel rejects Ct's offer to

- Strike tainted remarks
- Give curative instruction
- Permit remedial testimony

c. Failure to move to strike

- In determining motion for new trial, Ct may consider Atty's failure to move to strike in context of facts in case

B. Inadequate defense Atty

See **CR 41, Ineffective Assistance of Counsel**

Cuyler v Sullivan
100 S. Ct. 1708 (1980)
St v Fencl
109 Wis. 2d 224 (1982)
St v Kaye
106 Wis. 2d 1 (1982)

C. Conflict of interest

1) Burden of proof on Def

2) Def must show by clear and convincing evidence that actual conflict of interest existed

Def need not demonstrate prejudice to obtain relief

D. Prejudicial pretrial publicity

St v Alfonsi
33 Wis. 2d 469 (1967)

1) Change of venue

   a. Ct may be required to act sua sponte in some situations, when

      - No request for delay of trial made, or
      - No request for change of venue made

Schenk v St
51 Wis. 2d 600 (1971)

2) Prejudice must be shown in record

   a. Prejudice does not appear in case when likelihood of unfairness not shown factually in record

Gelhaar v St
58 Wis. 2d 547 (1973)

E. Def's absence during some or all of trial proceedings

1) Bench and chamber conferences that exclude Def not violations of Def's constitutional or statutory right to be present during trial, provided that conferences dealt solely with

   a. Questions of law

   b. Matters of procedure

   c. Matters of scheduling

Recommendation

2) During trial and jury deliberations, Def should be present at all meetings with counsel and jury

9. Postconviction Discovery

St v O'Brien
214 Wis. 2d 328,*aff'd*,
223 Wis. 2d 303 (1999)

A. To obtain postconviction discovery of physical evidence, Def must show that evidence sought is "consequential" to issue in case

"Consequential" evidence is evidence that creates reasonable probability of different trial outcome

St v Parker
2002 WI App 159
256 Wis. 2d 154
St v Noble
2001 WI App 145
246 Wis. 2d 533
rev'd on other grounds
2002 WI 64
253 Wis. 2d 206

B. Def's due-process rights are violated by posttrial destruction of evidence and new trial is required, if evidence destroyed was

1) Apparently exculpatory and of such a nature that Def would be unable to obtain comparable evidence by other reasonable means, or

2) Potentially exculpatory and was destroyed in bad faith

§ 752.35
Jones v St
70 Wis. 2d 41 (1975)

10. Granting New Trial in Interests of Justice

St v Henley
2010 WI 97
328 Wis. 2d 544

A. Ct has no "inherent authority" to grant a new trial

Garcia v St
73 Wis. 2d 651 (1976)
St v Cuyler
110 Wis. 2d 133 (1983)

B. New trial to be granted only when

1) Apparent miscarriage of justice, and

St v Larsen
141 Wis. 2d 412
(Ct. App. 1987)

It must appear that Def should not have been found guilty

St v Murdock
2000 WI App 170
238 Wis. 2d 301

2) Substantial probability that new trial will produce different result

St v Cuyler
110 Wis. 2d 133 (1983)
St v Davis
2011 WI App 147
337 Wis. 2d 688
St v Jeffrey AW
2010 WI App 29
323 Wis. 2d 541

C. Miscarriage of justice if real controversy not fully tried, such as

St v Ambuehl
145 Wis. 2d 343
(Ct. App. 1988)

1) When jury erroneously not permitted to hear important testimony

St v Bellows
218 Wis. 2d 614
(Ct. App. 1998)

2) When improperly admitted evidence so clouded crucial issue that real controversy not fully tried

3) When wrong instruction given, thereby preventing jury from adequately considering Def's claim

St v Harp
161 Wis. 2d 773
(Ct. App. 1991)

4) No showing of probable likelihood of different result at second trial required

St v Cuyler
110 Wis. 2d 133 (1983)

D. If credibility is crux of case, Ct must not erroneously exclude opinion evidence

11. Procedure When Transcripts Are Missing

St v Pope
2019 WI 106
389 Wis. 2d 390
St v Perry
136 Wis. 2d 92 (1987)

A. Def must make facially valid claim of arguably prejudicial error contained in the missing transcript

1) Need not show actual prejudice

2) Must at least claim a reviewable error occurred during the missing portion of the trial

B. If Def succeeds, Ct then makes discretionary determination whether record can be reconstructed

1) If possible, appellant bears burden to reconstruct

Ct must be convinced beyond a reasonable doubt that record has been properly reconstructed

2) If not possible, Ct must order a new trial

CR 41: INEFFECTIVE ASSISTANCE OF COUNSEL

1. Constitutional Right to Counsel Means Effective Assistance of Counsel ..... CR 41-1
2. Specific Areas of Attorney Performance ..... CR 41-5
3. Disciplinary Implications of Finding Attorney Ineffective ..... CR 41-13
4. Ineffective Assistance of Appellate Counsel ..... CR 41-13

McMann v Richardson
90 SCt 1441 (1970)

1. Constitutional Right to Counsel Means Effective Assistance of Counsel

Strickland v Washington
104 SCt 2052 (1984)

A. Benchmark: Whether counsel's conduct so undermined proper functioning of adversarial process that trial cannot be relied on as having produced just result

Strickland v Washington
104 SCt 2052 (1984)
St v Pitsch
124 Wis. 2d 628 (1985)

B. Two-prong test: Deficient performance and prejudice

St v Curtis
218 Wis. 2d 550
(Ct. App. 1998)
St v Machner
92 Wis. 2d 797
(Ct. App. 1979)

1) Def must initiate *Machner* hearing in Trial Ct and show counsel's representation deficient, fell below objective standard of reasonableness

a. Def must identify deficient acts or omissions

- ABA Standards for Criminal Justice are appropriate source of objective standards

St v Ambuehl
145 Wis. 2d 343
(Ct. App. 1988)

- Lawyer who violates professional conduct rules not necessarily ineffective

St v Cooper
2019 WI 73
387 Wis. 2d 439

b. Ct must determine, based on all circumstances, whether act or omission outside range of professionally competent assistance

St v Foy
206 Wis. 2d 629
(Ct. App. 1996)

c. Judicial scrutiny of Atty performance highly deferential

St v Maloney
2005 WI 74, ¶ 25
281 Wis. 2d 595

- Avoid determinations of ineffectiveness based on hindsight

- Burden on Def to overcome strong presumption that counsel acted reasonably within professional norms

St v Swinson
2003 WI App 45
261 Wis. 2d 633
St v Randle
2002 WI App 116
252 Wis. 2d 743
St v Adams
221 Wis. 2d 1
(Ct. App. 1998)

d. Failure to raise issue of law is not deficient performance if Trial Ct later determines that legal issue is without merit

St v Hunt
2014 WI 102, ¶ 55
360 Wis. 2d 576

e. Strategic trial decision rationally based on facts and law is not ineffective assistance

St v Allen
2004 WI 106
274 Wis. 2d 568
St v McDougle
2013 WI App 43
347 Wis. 2d 302

f. Motion claiming ineffective assistance of counsel does not automatically trigger a right to a testimonial hearing. No hearing required if

St v Jackson
2023 WI 3
405 Wis. 2d 458

- Def fails to allege sufficient facts in motion to raise question of fact, or

St v Saunders
196 Wis. 2d 45
(Ct. App. 1995)

- Def presents only conclusory allegations or subjective opinion, or

St v Jeninga
2019 WI App 14
386 Wis. 2d 336

- Def fails to present objective facts about subjective decision to enter plea

St v Ruffin
2022 WI 34, ¶ 37
401 Wis. 2d 619
St v Bentley
201 Wis. 2d 303 (1996)

- Record conclusively demonstrates that Def not entitled to relief, even if motion alleges sufficient nonconclusory facts

St v Mayo
2007 WI 78
301 Wis. 2d 642
St v Sanchez
201 Wis. 2d 219 (1996)

2) Def must show prejudice to defense, so as to deprive Def of a fair trial with a reliable result

St v Hunt
2014 WI 102, ¶ 40
360 Wis. 2d576
St v Moffett
147 Wis. 2d 343 (1989)

a. Must affirmatively show reasonable probability that, but for counsel's unprofessional errors, result of proceeding would have been different

St v Vinson
183 Wis. 2d 297
(Ct. App. 1994)

- Not every error that conceivably could have influenced outcome of case undermines reliability of result of proceedings

- Reasonable probability is one sufficient to undermine confidence in outcome

St v Stroik
2022 WI App 11
401 Wis. 2d 150

- Def need not prove different outcome definitively

St v Lindell
2001 WI 108
245 Wis. 2d 689
St v Teynor
141 Wis. 2d 187
(Ct. App. 1987)

- Prejudice not sufficient if effect of evidence minimal and did not affect outcome of trial

St v Moffett
147 Wis. 2d 343 (1989)

- Isolated trivial effect not enough

St v Damaske
212 Wis. 2d 169
(Ct. App. 1997)

- Def required to prove partiality or unfairness of Judge from record in case in which issue premised on untimely request for substitution of Judge

St v Sholar
2018 WI 53, ¶¶ 37–40
381 Wis. 2d 560

- Analysis of prejudice may be done on count-by-count basis; prejudice on one count does not necessarily undermine entire verdict

b. Ct must consider in light of totality of evidence before Judge or jury

Strickland v Washington
104 SCt 2052 (1984)
St v Smith
207 Wis. 2d 258 (1997)
St v Villarreal
2013 WI App 33
346 Wis. 2d 690

c. Prejudice presumed only if Def shows by clear and convincing evidence that Atty has conflict of interest or Atty failed to object to prosecutor's breach of plea agreement

St v Knox
213 Wis. 2d 318
(Ct. App. 1997)

- Inadvertent, promptly rectified misstatement of plea agreement by prosecutor may not constitute a substantial breach or due-process violation and Def not entitled to new sentencing

St v Erickson
227 Wis. 2d 758 (1999)

d. Presumption of prejudice and automatic reversal do not apply to situation in which error leaves Def with legally insufficient juror strikes, but number of peremptory strikes is not less than strikes available to prosecutor

St v Voss
205 Wis. 2d 586
(Ct. App. 1996)

e. No prejudice if sentence would not change even with allegation that trial counsel failed to object to sentencing information and present witnesses at sentencing

St v Anderson
222 Wis. 2d 403
(Ct. App. 1998)

f. Failure to seek adjournment to review and correct PSI, coupled with DA and Ct reliance on information is deficient performance and prejudicial, requiring a new sentencing

St v Fritz
212 Wis. 2d 284
(Ct. App. 1997)

g. Def must prove s/he would have accepted plea bargain but for deficient performance

C. Procedure

St v Machner
92 Wis. 2d 797
(Ct. App. 1979)

1) Trial counsel must be called to testify concerning reasons behind actions taken

St v Bonds
161 Wis. 2d 605
(Ct. App.)
rev'd on other grounds
165 Wis. 2d 27 (1991)

a. Ct to determine whether Atty's actions result of deliberate trial strategies or incompetence

St v Lukasik
115 Wis. 2d 134, 140
(Ct. App. 1983)

b. If trial counsel dead, insane, or unavailable, allegations of ineffectiveness must be corroborated. Def cannot rebut presumption of effectiveness by own words

St v Mosley
201 Wis. 2d 36
(Ct. App. 1996)

c. Failure to procure attendance of Def's trial Atty waives claim of ineffective counsel

St v Simpson
200 Wis. 2d 798
(Ct. App. 1996)

d. Def's trial Atty may testify even if direct criticism of trial counsel is withdrawn

§ 905.03(4)(c)
St v Flores
170 Wis. 2d 272, 277–78
(Ct. App. 1992)

e. Lawyer-client privilege waived when Def alleges ineffective assistance of counsel

St v Vennemann
180 Wis. 2d 81 (1993)
St v Saunders
196 Wis. 2d 45
(Ct. App. 1995)

2) Def has right to be present at evidentiary hearing unless Def did not participate in event that is the subject matter of the factual dispute in the hearing

Strickland v Washington
104 SCt 2052 (1984)
St v Foy
206 Wis. 2d 629
(Ct. App. 1996)

3) Ct may decide lack of prejudice first without determining deficiency of performance of counsel

St v Schultz
148 Wis. 2d 370
(Ct. App. 1988), *aff'd*,
152 Wis. 2d 408 (1989)

a. Ct should proceed directly to issue of prejudice, if easier

Kimmelman v Morrison
106 SCt 2574 (1986)

4) When ineffective counsel claim based on omission (e.g., failure to move for suppression of physical evidence), procedure to determine prejudice is

St v Jones
181 Wis. 2d 194
(Ct. App. 1993)

a. Hold omitted hearing

- In example above, State has burden to show reasonableness of search at suppression hearing
- Def then has burden to show that exclusion of tainted evidence would probably have led to different result

5) Defense may be required to provide expert testimony as to objective standard of reasonableness relative to claimed deficiency

D. Remedies

1) Normal remedy is to restore Def to stage in proceedings before acts of ineffectiveness by counsel

St v Smith
207 Wis. 2d 258 (1997)

a. Error at sentencing entitles Def to a new sentencing hearing before a new judge

St v Lentowski
212 Wis. 2d 849
(Ct. App. 1997)

b. Pretrial error affecting guilty plea vacates plea and sentence and entitles Def to new trial

St v Fritz
212 Wis. 2d 284
(Ct. App. 1997)

c. Remedy normally will not require prosecutor to reinstate original guilty plea offer

St v Felton
110 Wis. 2d 485 (1983)
St v Lettice
205 Wis. 2d 347
(Ct. App. 1996)

d. Trial error entitles Def to new trial

2. Specific Areas of Attorney Performance

A. ABA Standards are appropriate source of objective standards

St v Ambuehl
145 Wis. 2d 343
(Ct. App. 1988)

1) Expert testimony not admissible to show trial counsel performed effectively

St v Pico
2018 WI 66, ¶¶ 40–47
382 Wis. 2d 273

B. Discovery and investigation

Strickland v Washington
104 SCt 2052 (1984)

1) Counsel has duty to make reasonable investigations or to make reasonable decision that makes particular investigations unnecessary

2) Ineffective assistance when counsel

Kimmelman v Morrison
106 SCt 2574 (1986)

a. Fails to conduct discovery that would have prompted suppression motion of bedsheet in rape prosecution

St v Thiel
2003 WI 111
264 Wis. 2d 571

b. Fails to review discovery

St v Pitsch
124 Wis. 2d 628 (1985)

c. Fails to ascertain precise number of prior convictions of Def

St v Felton
110 Wis. 2d 485 (1983)
St v Byrge
225 Wis. 2d 702
(Ct. App. 1999)
aff'd on other grounds
2000 WI 101
237 Wis. 2d 197

d. Abandons NGI defense based on inadequate investigation, unless Def acts contrary to Atty's advice

St v Hicks
195 Wis. 2d 620
(Ct. App. 1995)
aff'd on other grounds
202 Wis. 2d 150 (1996)

e. Fails to initiate DNA test of potential evidence

St v Stroik
2022 WI App 11
401 Wis. 2d 150

f. Fails to investigate child sexual assault victim's prior recanted allegations of sexual assault

St v Schultz
148 Wis. 2d 370
(Ct. App. 1988). *aff'd*,
152 Wis. 2d 408 (1989)

3) Failure to investigate Def's story not deficient when Atty makes reasonable judgment that Def's story not related to critical factors in trial

C. Knowledge of applicable law

St v Felton
110 Wis. 2d 485 (1983)
St v Hubert
181 Wis. 2d 333
(Ct. App. 1993)

1) Prudent lawyer must be skilled and versed in criminal law but excused from knowing every isolated area of law

St v Harris
133 Wis. 2d 74
(Ct. App. 1986)

2) Counsel afforded reasonable exercise of judgment falling within wide range of professionally competent assistance

St v McMahon
186 Wis. 2d 68
(Ct. App. 1994)

3) Ineffective assistance of counsel limited to situations in which law or duty clear, such that reasonable counsel should know enough to raise the issue

4) Ineffective assistance when counsel

St v Pitsch
124 Wis. 2d 628 (1985)

a. Lacks knowledge of procedure for impeachment of Def by prior convictions

St v Felton
110 Wis. 2d 485 (1983)

b. Lacks knowledge of heat-of-passion manslaughter

St v Lentowski
212 Wis. 2d 849
(Ct. App. 1997)

c. Recommends trial rather than guilty plea to Def based on invalid defenses

Arrowood v Clusen
732 F2d 1364
(7th Cir 1984)
St v Nicholson
187 Wis. 2d 688
(Ct. App. 1994)

d. Fails to request proper jury instruction on trustworthiness of confessions, when defense theory involves challenge to credibility of Def's confession unless action is legitimate tactical decision of counsel

St v Dillard
2014 WI 123
358 Wis. 2d 543

e. Fails to know and correctly advise Def of the applicability of the persistent repeater enhancer

St v Mader
2023 WI App 35
408 Wis. 2d 632
pet for rev denied

f. Fails to object to expert testimony that provides a mathematical statement approaching certainty that false reporting does not occur

5) Not necessarily deficient performance when counsel

St v Veach
2002 WI 110
255 Wis. 2d 390

a. Lacks knowledge of potential availability and benefits of client's admission or stipulation to elements of crime

St v Cleveland
2000 WI App 142
237 Wis. 2d 558

- Atty's failure to stipulate to evidence at heart of trial issue is not deficient

St v Carter
2010 WI 40
324 Wis. 2d 640

b. Failed to introduce evidence that child victim was previously sexually assaulted

D. Adequacy of preparation/trial presentation

State v. Mull
2023 WI 26
406 Wis. 2d 491
St v Oswald
2000 WI App 2
232 Wis. 2d 62

1) Fact that counsel's pretrial or trial strategy is unsuccessful does not necessarily mean performance legally insufficient so long as strategy constitutes a genuine defense

St v Moffett
147 Wis. 2d 343 (1989)

2) Unintentional oversight in introducing evidence at trial is ineffectiveness if not product of reasoned deliberate defense strategy

St v Dunlap
2000 WI App 251
239 Wis. 2d 423
rev'd on other grounds
2002 WI 19
250 Wis. 2d 466

3) Failure to initiate critical pretrial motion may be deficient performance

St v Cleveland
118 Wis. 2d 615 (1984)

a. When only evidence of Def's guilt was fruit of no-knock search warrant, counsel ineffective for not moving to suppress

St v Jenkins
2014 WI 59
355 Wis. 2d 180
St v Eckert
203 Wis. 2d 497
(Ct. App. 1996)
St v Elm
201 Wis. 2d 452
(Ct. App. 1996)
St v Delgado
194 Wis. 2d 737
(Ct. App. 1995)

4) Failure to call critically important witness may be deficient performance by counsel, unless

a. Consistent with reasoned defense strategy

b. Witness's testimony would not be critical and would not have changed result of trial

St v Franklin
228 Wis. 2d 408
(Ct. App. 1999)

c. Def admits to counsel that testimony of potential witnesses would not be true

St v Tkacz
2002 WI App 281
258 Wis. 2d 611
St v Adams
221 Wis. 2d 1
(Ct. App. 1998)
St v Elm
201 Wis. 2d 452
(Ct. App. 1996)

5) Ineffectiveness for failure to ask questions, object to questions, or seek mistrial depends on significance of questions and whether different result would occur

St v Gordon
2003 WI 69
262 Wis. 2d 380

6) Whether Atty who fails to object to erroneous jury instructions and/or makes concessions of guilt during final argument performs deficiently depends on the circumstances

St v Lettice
205 Wis. 2d 347
(Ct. App. 1996)

7) Prosecutorial misconduct causing poor preparation and presentation by Def's Atty will justify new trial

St v Brewer
195 Wis. 2d 295
(Ct. App. 1995)
St v Tatum
191 Wis. 2d 547
(Ct. App. 1995)

8) Failure to object to attire or shackles of defense witness may be deficient unless part of legitimate strategy

St v Carter
2002 WI App 55
250 Wis. 2d 851

9) Failure to challenge subjectively biased juror for cause or use peremptory strike may justify new trial

St v Pote
2003 WI App 31
260 Wis. 2d 426

10) Failure to argue mitigating factors at time of sentencing, to request continuance, or to withdraw after Def rejected probation may be deficient performance

St v Guerard
2004 WI 85
273 Wis. 2d 250

11) Failure to effectively argue admissibility of hearsay statements to exculpate Def is deficient performance

St v Krueger
2008 WI App 162
314 Wis. 2d 605

12) Failure to object to testimony offering an opinion as to victim's truthfulness

St v Harris
2012 WI App 79
343 Wis. 2d 479

13) Failure to object to inaccurate information presented to and referred to by Ct at reconfinement hearing after revocation of extended supervision

St v Weigel
2022 WI App 48
404 Wis. 2d 488

14) Failure to object to prosecutor's statement at sentencing that breached the plea agreement

E. Ethical violations

1) Conflicts of interest—multiple representation

Wheat v US
108 SCt 1692 (1988)
St v Kaye
106 Wis. 2d 1 (1982)

a. Ct must conduct inquiry whenever same Atty or law firm represents more than one Def in same criminal case

b. For recommended procedure of inquiry, see Wis JI-Cr SM-45

c. Waiver of right to separate counsel must be free, voluntary and understanding

St v Miller
160 Wis. 2d 646 (1991)

d. Ct has authority to disqualify counsel, even over Def's objection and over Def's adequate waiver of right to conflict-free representation, when actual or serious potential conflict of interest exists

- Ct should be alert to possibility that government may seek to create conflict to eliminate formidable adversary

Strickland v Washington
104 SCt 2052 (1984)
St v Street
202 Wis. 2d 533
(Ct. App. 1996)
St v Villarreal
2013 WI App 33
346 Wis. 2d 690

e. Prejudice in multiple-representation cases presumed if Def demonstrates by clear and convincing evidence that counsel actively represented conflicting interests and that actual conflict of interest adversely affected Def's Atty's performance

- Actual conflict of interest exists when Atty's advocacy somehow adversely affected by competing loyalties

St v Dadas
190 Wis. 2d 339
(Ct. App. 1994)

- Conflict of interest exists when incriminating information voluntarily supplied by one client used to

  — Provide evidence of another client's criminal activities

  — Expose another client to potential criminal prosecution, or

  — Provide justification for a sentencing recommendation or a sentence

St v Street
202 Wis. 2d 533
(Ct. App. 1996)

f. Representation of State's witness and Def is conflict in interest, but Def must prove conflict adversely affected performance

2) Conflicts of interest—serial representations

St v Love
227 Wis. 2d 60 (1999)

a. Serial representation occurs when an Atty represents one side in a case, then switches sides to represent other side in same or unrelated case

b. Potential multiple or serial representation conflicts must be disclosed to Def and Ct as soon as possible before trial to allow hearing and change of counsel or waiver of conflict if required

St v Love
227 Wis. 2d 60 (1999)

c. Def raising serial representation conflict of interest initially after trial must prove by clear and convincing evidence that trial counsel converted potential conflict into actual conflict of interest by

- Knowingly failing to disclose to Def or Ct before trial the Atty's former prosecution of Def, or
- Representing the Def in a manner that adversely affected Def's interests

d. If either of factors above are proven, Ct should provide appropriate relief for Def and Atty is subject to Office of Lawyer Regulation (OLR) discipline

St v Love
227 Wis. 2d 60 (1999)

e. Def entitled to no relief when Atty reasonably had no recollection of prosecuting Def in same case and when Atty represented Def effectively at sentencing after revocation of probation

St v Cobbs
221 Wis. 2d 101
(Ct. App. 1998)

f. Prior prosecutions of Def by Def's Atty may not conflict with current representation of Def if Ct engages in *Kaye* colloquy with Def and no actual competing loyalties exist

3) Other conflicts of interest

Walberg v Israel
766 F2d 1071
(7th Cir 1985)

a. Conflict of interest when Trial Judge threatened defense counsel with denial of further indigent appointments if counsel pressed too hard

St v Franklin
111 Wis. 2d 681
(Ct. App. 1983)

b. Conflict of interest when defense counsel sought bail assignment for fee when plea agreement was bail money to be used for restitution

Nix v Whiteside
106 SCt 988 (1986)

4) Perjury dilemma

SCR 20:3.3

a. No constitutional right to testify falsely

SCR 20:3.4

b. Counsel may not <u>knowingly</u> assist in presenting false evidence

St v McDowell
2004 WI 70
272 Wis. 2d 488

c. Absent extraordinary circumstances, Def's Atty cannot know Def will testify falsely unless Def admits intent to do so

Strickland v Washington
104 SCt 2052 (1984)

F. Duty to consult with Def on important decisions

St v Divanovic
200 Wis. 2d 210
(Ct. App. 1996)

1) Counsel must follow Def's instructions on fundamental defense objective

St v Yang
201 Wis. 2d 725
(Ct. App. 1996)
St v Jackson
188 Wis. 2d 537
(Ct. App. 1994)

2) Decision to poll jurors is delegated to Atty, and failure to inform Def of significance of right to poll jury may not be ineffective counsel

St v Eckert
203 Wis. 2d 497
(Ct. App. 1996)

3) Deficient performance when counsel fails to do the following

St v Ludwig
124 Wis. 2d 600 (1985)

a. Inform Def of plea offer

St v Felton
110 Wis. 2d 485 (1983)
St v Byrge
225 Wis. 2d 702
(Ct. App. 1999)
aff'd on other grounds
2000 WI 101
237 Wis. 2d 197

b. Consult with Def before withdrawal of NGI plea, but counsel not ineffective if Def presents voluntary and understanding waiver and refuses to testify and follow counsel's recommendation

St v Naydihor
2004 WI 43
270 Wis. 2d 585
St v Smith
207 Wis. 2d 258 (1997)
St v Sprang
2004 WI App 121
274 Wis. 2d 784

c. Object to violation of plea agreement by DA, but may forgo objection if decision to forgo is strategically sound and counsel first consults Def

St v Eckert
203 Wis. 2d 497
(Ct. App. 1996)

d. Discuss with Def submission of lesser included offenses, unless submission would be inconsistent with Def's theory of defense

St v McDowell
2004 WI 70
272 Wis. 2d 488

e. Inform Def, opposing counsel, and Ct of change to narrative questioning style when counsel has knowledge Def will testify falsely

St v Shata
2015 WI 74
364 Wis. 2d 63

f. Advise that pleading guilty to charge may result in deportation

St v Johnson
133 Wis. 2d 207 (1986)

G. Competency of Def to proceed is decided by Ct, so failure to bring evidence of incompetency to Ct's attention constitutes ineffective assistance of counsel

Garza v Idaho
139 SCt 738 (2019)

H. Presumption of prejudice applies when counsel does not honor Def's request to file appeal notwithstanding Def's waiver of appeal right

3. Disciplinary Implications of Finding Attorney Ineffective

SCR 20:1.1, 20:1.3

A. Particular duties of Attys

1) A lawyer should act with competence, proper care, and proficiency

2) A lawyer may not handle a legal matter without adequate preparation

SCR 20:1.7
In re Eisenberg
117 Wis. 2d 332 (1984)

3) A lawyer must decline proffered employment under circumstances that would likely adversely affect independent professional judgment on behalf of another client

St v Love
227 Wis. 2d 60 (1999)

4) Knowing failure to advise Def or Ct of potential conflict of interest subjects Atty to OLR discipline

SCR 60.04(3)(b)

B. Response of Judges

1) Take appropriate action if substantial likelihood that Atty has violated rules of professional conduct

2) If personal knowledge that Atty committed violation of rules of professional conduct, raising substantial question as to Atty's honesty, trustworthiness, or fitness as lawyer, inform OLR

4. Ineffective Assistance of Appellate Counsel

Evitts v Lucey
105 SCt 830 (1985)

A. Due process requires that a Def receive effective assistance under first appeal as of right

St v Evans
2004 WI 84
273 Wis. 2d 192
St v Knight
168 Wis. 2d 509 (1992)

B. Proper procedure is petition for writ of habeas corpus brought before the appellate Ct

St ex rel Panama v Hepp
2008 WI App 146
314 Wis. 2d 112
St ex rel Rothering v McCaughtry
205 Wis. 2d 675
(Ct. App. 1996)

1) Claim of ineffective assistance of postconviction motion counsel should be raised in Trial Ct by either petition for habeas corpus or a § 974.06 motion

St ex rel Kyles v Pollard
2014 WI 38
354 Wis. 2d 626

2) Claim for ineffective assistance of trial counsel for failure to file notice of intent to pursue postconviction relief must be filed in Appellate Ct by petition for habeas corpus

St ex rel Warren v Meisner
2020 WI 55
392 Wis. 2d 1

3) Claim for ineffective postconviction counsel for failure to raise claim of ineffective trial counsel is in Circuit Ct

C. Question of effective assistance of appellate counsel is mixed question of law and fact

St ex rel Flores v St
183 Wis. 2d 587 (1994)

1) *Machner*-type hearing may be necessary

2) Hearing—expect remand to Trial Ct for fact-finding

McCoy v Ct of Appeals
108 SCt 1895 (1988)

D. Def has burden to prove ineffective assistance of appellate counsel

St ex rel Flores v State
183 Wis. 2d 587 (1994)

1) Deficient performance by counsel

St v Starks
2013 WI 69
349 Wis. 2d 274,
modified in part on other grounds by St ex rel Warren v Meisner, 2020 WI 55, 392 Wis. 2d 1

a. When Def alleges deficiency for not raising a particular claim, Def must show the particular nonfrivolous issue is "clearly stronger" than issues that counsel did present

St v Romero-Georgana
2014 WI 83
360 Wis. 2d 522

- Consider any objectives or preferences Def conveyed to Atty

2) Deficient performance was prejudicial

St ex rel Flores v St
183 Wis. 2d 587, 620 (1994)

a. Prejudice is presumed from complete denial of right to appeal

E. Grounds for ineffective appellate assistance

St ex rel Schmelzer v Murphy
201 Wis. 2d 246 (1996)

1) Failure to perfect appeal or filing of tardy petition for review

2) Failure to file no-merit report unless a voluntary and intelligent waiver

3) Failure to raise meritorious claims on appeal

St ex rel Ford v Holm
2004 WI App 22
269 Wis. 2d 810

4) Wrongly concluding Def had knowingly and intelligently waived right to counsel or right to appeal

St ex rel Schmidt v Cooke
180 Wis. 2d 187
(Ct. App. 1993)

F. Def is entitled to bring only one such writ before the appellate Ct

St ex rel Dismuke v Kolb
149 Wis. 2d 270
(Ct. App. 1989)

1) Unless Def can adequately explain why all issues relating to ineffective assistance were not raised in first petition

St ex rel Washington v St
2012 WI App 74
343 Wis. 2d 434

G. Laches is an available defense to have against a petition

CR 42: § 974.06 MOTIONS

1. Nature of Motion ..... CR 42-1
2. Conditions Precedent ..... CR 42-3
3. Authorized Grounds for Motion ..... CR 42-5
4. Form of Motion ..... CR 42-7
5. Preliminary Procedure for Examining Petition ..... CR 42-8
6. Summary Dismissal ..... CR 42-9
7. Granting a Hearing ..... CR 42-14
8. Hearing Procedures ..... CR 42-16
9. Appeal ..... CR 42-18

1. Nature of Motion

A. Purpose

§ 974.06(1)
St v Carter
131 Wis. 2d 69 (1986)

1) To collaterally challenge validity of judgment of conviction and sentence

St v Johnson
101 Wis. 2d 698
(Ct. App. 1981)

St v Nicholson
148 Wis. 2d 353
(Ct. App. 1988)

a. Not challenge to validity of custody itself, unlike habeas corpus procedures

b. Cannot reach procedural errors that do not reach constitutional or jurisdictional status

c. Not substitute for

Peterson v St
54 Wis. 2d 370 (1972)

- Motion for new trial

St v Flores
158 Wis. 2d 636
(Ct. App. 1990)

- Motion for modification of sentence (which presupposes valid conviction)

St v Nicholson
148 Wis. 2d 353
(Ct. App. 1988)

- Direct appeal

Zuehl v St
69 Wis. 2d 355 (1975)
Peterson v St
54 Wis. 2d 370 (1972)

2) Sec. 974.06 procedures designed to supplant habeas corpus and other special writs in more convenient forum, Ct of conviction

§ 974.06(8)
Peterson v St
54 Wis. 2d 370 (1972)

a. Remedy of habeas corpus withheld pending resort to § 974.06 motions seeking same relief

Jessen v St
95 Wis. 2d 207 (1980)

b. Procedure does not supplant common-law writ of error *coram nobis*

§ 974.06(2)
St v Brice
61 Wis. 2d 397 (1973)

3) Procedure is further step in Def's original criminal case, not separate civil action

§ 974.06(6)

a. Civil in nature

§ 974.06(6)
St v Walberg
109 Wis. 2d 96 (1982)

b. Burden on Def to overcome finality of criminal conviction

St v Coogan
154 Wis. 2d 387
(Ct. App. 1990)

4) Sec. 974.06 intended to reach constitutional and jurisdictional issues not raised in original trial

B. Scope

St v Walberg
109 Wis. 2d 96 (1982)
St v Kimpel
153 Wis. 2d 697
(Ct. App. 1989)

1) Available only after State process and Def's conviction finalized

2) Sec. 974.06 procedure limited to

a. Issues concerning Ct's jurisdiction to enter judgment or impose sentence

- Both personal and subject-matter jurisdiction of convicting Ct

St v Johnson
101 Wis. 2d 698
(Ct. App. 1981)

Mack v St
93 Wis. 2d 287 (1980)

b. Issues of constitutional dimension

St v Miller
2009 WI App 111
320 Wis. 2d 724
St v Johnson
101 Wis. 2d 698
(Ct. App. 1981)

- Mere allegations that certain trial errors resulted in violation of constitutional rights do not necessarily raise issue to one of constitutional dimensions

Bergenthal v St
72 Wis. 2d 740 (1976)

§ 974.06(3)(d)
Rohl v St
90 Wis. 2d 18
(Ct. App. 1979)
rev'd on other grounds by
96 Wis. 2d 621 (1980)

- Def must have been denied constitutional rights that render judgment vulnerable to collateral attack

St v Nicholson
148 Wis. 2d 353
(Ct. App. 1988)

- Trial Ct error in failing to submit lesser included instruction, reversible on appeal, does not equate with a due-process constitutional violation

St v Sharlow
106 Wis. 2d 440
(Ct. App. 1982), *aff'd*,
110 Wis. 2d 226 (1983)

Sanders v US
83 SCt 1068 (1963)

3) Motion cannot raise issues decided by previous direct appeal

a. If doubt arises as to whether a § 974.06 motion raises same ground as decided on previous appeal, resolve doubt in favor of petitioner

§ 974.06(4)
St v Klimas
94 Wis. 2d 288
(Ct. App. 1979)

4) Motion may raise issues that for sufficient reason not asserted on direct appeal

Teague v Lane
109 SCt 1060 (1989)

C. Retroactive effect of "new rules" generally prohibited as basis for § 974.06 motion

1) Exceptions

St v Horton
195 Wis. 2d 280
(Ct. App. 1995)

a. If new rule places certain kinds of primary, private individual conduct beyond power of the criminal lawmaking authority to proscribe, or

b. If new rule requires the observance of procedures that are implicit in concept of ordered liberty or constitute watershed rule of criminal procedure

2) "New rule" meets definition if it breaks new ground or imposes a new obligation on State or federal government

2. Conditions Precedent

A. Timely filing

St v Walberg
109 Wis. 2d 96 (1982)

1) Procedure available only after State process and conviction finalized

§ 974.06(1)

a. Time for appeal or other postconviction remedies under § 974.02 must have expired, or

Peterson v St
54 Wis. 2d 370 (1972)

b. Def has completely exhausted direct remedies, including

- Motion for new trial, and
- Appeal

§ 974.06(1)
St v Redmond
203 Wis. 2d 13
(Ct. App. 1996)

2) Ct has no subject-matter jurisdiction to entertain motion until conviction finalized and direct remedies exhausted

B. Venue

§ 974.06(2)

1) Motion is part of original criminal action

§ 974.06(3)
Zuehl v St
69 Wis. 2d 355 (1975)

a. May be brought only in Trial Ct where Def convicted

Krueger v St
53 Wis. 2d 345 (1972)

b. Sec. 974.06 obligates Judge to review allegations that Judge erred in original trial

Recommendation

2) Any other Ct receiving motion papers should transfer motion to original Ct of conviction

St ex rel Warren v Meisner
2020 WI 55
392 Wis. 2d 1

3) Ct of conviction is proper forum for appellate counsel to challenge failure of postconviction counsel to raise ineffective assistance of trial counsel

C. Custody requirement

Jessen v St
95 Wis. 2d 207, 210–11 (1980)
St v Schill
93 Wis. 2d 361, 373 (1980)

1) Custody is "rigid" condition for subject-matter jurisdiction imposed by legislature

§ 974.06(1)
Jessen v St
95 Wis. 2d 207 (1980)
St v Theoharopoulos
72 Wis. 2d 327 (1976)
St v Bell
122 Wis. 2d 427 (Ct. App. 1984)

2) Def must be a "prisoner in custody under sentence of a court"

St v Theoharopoulos
72 Wis. 2d 327 (1976)

a. "Custody under sentence of a court" not custody, unless related to Wis State Ct process

- Wis sentence or Wis process must mandate Def's custody
- Wis State Cts have no jurisdiction to set aside custody vested in federal authorities

b. Custody requirement should be interpreted liberally in this context

§ 301.048(4)(a)

c. Def in intensive sanctions program is "prisoner in custody under sentence of a court"

St v Mentzel
218 Wis. 2d 734 (Ct. App. 1998)

d. Def on straight probation with sentence withheld is "in custody under sentence of a court"

Thiesen v St
86 Wis. 2d 562 (1979)
St v Bell
122 Wis. 2d 427
(Ct. App. 1984)

3) Expired sentence or judgment, when custody no longer in effect

a. Ct loses subject-matter jurisdiction to decide a § 974.06 motion

b. Motion not mooted by expiration of sentence or judgment

St v Witkowski
163 Wis. 2d 985
(Ct. App. 1991)

c. Motion not mooted by death of Def

St v Schill
93 Wis. 2d 361 (1980)

4) Judgment for fine as only sanction not sufficient for § 974.06 jurisdiction

3. Authorized Grounds for Motion

Mack v St
93 Wis. 2d 287 (1980)
St v Carter
131 Wis. 2d 69
(Ct. App. 1986)

A. Grounds cognizable under § 974.06 are narrow and preclude all claims except those expressly enumerated

§ 974.06(1)

B. Sentences imposed in violation of State law

St ex rel Warren v Cty Ct
54 Wis. 2d 613 (1972)

1) Sec. 974.06 motion not remedy for ordinary rehearing or reconsideration of sentencing on merits

St v Coolidge
173 Wis. 2d 783
(Ct. App. 1993)

2) Sec. 974.06 motion and motion to modify sentence conceptually distinct

a. Sec. 974.06 motion challenges authority of Ct to impose sentence

b. Motion to modify sentence seeks to alter terms of sentence validly imposed

§ 974.06(1)

C. Convictions and sentences imposed in violation of US or Wis Constitution

Walberg v St
73 Wis. 2d 448 (1976)
St v Johnson
101 Wis. 2d 698
(Ct. App. 1981)

1) Sec. 974.06 motion must raise issue of constitutional dimension

St v Carter
131 Wis. 2d 69 (1986)
Bergenthal v St
72 Wis. 2d 740 (1976)

2) Mere allegations that certain trial errors resulted in violation of constitutional rights do not necessarily raise issue to one of constitutional dimensions

§ 974.06(3)(d)
Rohl v St
90 Wis. 2d 18
(Ct. App. 1979)
rev'd on other grounds
96 Wis. 2d 621 (1980)

3) Def must have been denied constitutional rights that render judgment vulnerable to collateral attack

§ 974.06(1)

D. Ct lacked jurisdiction to impose sentence, including

1) Jurisdiction over person of Def, or

Walberg v St
73 Wis. 2d 448 (1976)

2) Jurisdiction over subject matter of proceedings

Mack v St
93 Wis. 2d 287 (1980)

a. As failure to charge any offense known to law

3) Double jeopardy claim

§ 974.06(1)

E. Sentence imposed in excess of maximum authorized by law

1) Sec. 974.06 motions seldom raise issue because

St ex rel Warren v Cty Ct
54 Wis. 2d 613 (1972)

§ 973.13

a. Sec. 973.13 automatically invalidates excess of sentence to extent of maximum term authorized by law, and

§ 973.13

b. Sec. 973.13 provides that sentence "shall stand commuted without further proceedings"

§ 974.06(1)

F. Sentence imposed is otherwise subject to collateral attack

G. Waivers of grounds for motion

§ 974.06(4)

1) Sec. 974.06 itself countenances voluntary and intelligent waivers of grounds for motion

2) Waivers may occur during

§ 974.06(4)

a. Proceeding that resulted in Def's conviction or sentence, including

- Entering guilty plea
- Trial

§ 974.06(4)

b. Or, any other proceeding Def has taken to secure relief, including

- Motion for new trial

- Direct appeal
- Prior § 974.06 motions
  - — Unless claim is for ineffective assistance of counsel (same Atty at trial and appeal)

St v Robinson
177 Wis. 2d 46
(Ct. App. 1993)

§ 974.06(4)
St v Klimas
94 Wis. 2d 288
(Ct. App. 1979)

3) If Def does not raise issues cognizable on motion for new trial or direct appeal, such issues waived as basis for § 974.06 motions, unless

   a. Ct finds ground for relief asserted that for sufficient reason was not asserted earlier, or

§ 974.06(4)

   b. Ct finds ground for relief asserted that for sufficient reason was inadequately raised earlier

§ 974.06(4)
State ex rel Dismuke v Kolb
149 Wis. 2d 270
(Ct. App. 1989)

4) Def's failure to assert particular ground for relief in initial § 974.06 motion bars Def's assertion of ground in later motion, in absence of justification for omission

§ 974.06(4)

   a. Sufficient reason for not asserting ground for relief must be found by Ct, or

§ 974.06(4)
St v Love
2005 WI 116
284 Wis. 2d 111
St v McReynolds
2022 WI App 25
402 Wis. 2d 175
pet for rev denied

   b. Must sufficient reason why ground was inadequately raised previously, e.g., newly discovered evidence, change in postconviction counsel

St ex rel Dismuke v Kolb
149 Wis. 2d 270
(Ct. App. 1989)

   c. Def does not have unlimited right to file successive motions for relief

St v Braun
185 Wis. 2d 152 (1994)

5) Dismissal of previous motion because Def has escaped is final adjudication

4. Form of Motion

§ 974.06(4)

A. Def must raise all grounds for relief simultaneously in original motion, except Def may

1) Supplement original motion, and

2) Amend original motion

§ 974.06(1), (8)

B. Motion directed to Ct that imposed Def's sentence

C. Recusal of [illegible]

1) Def has no automatic right to substitution

Krueger v St
53 Wis. 2d 345 (1972)

a. Statutory request for substitution not timely under § 974.06

§ 971.20(4)
Krueger v St
53 Wis. 2d 345 (1972)

b. Sec. 974.06 obligates Trial Judge to review allegation that Judge erred in original trial

§ 974.06(1), (8)
Krueger v St
53 Wis. 2d 345 (1972)

2) Def may ask Judge to disqualify self from hearing motion on grounds of prejudice

Bergenthal v St
72 Wis. 2d 740 (1976)

a. Def should make request in original petition

Recommendation

3) Judge has discretion whether to disqualify self if issue of prejudice raised or reasonably shown

Bergenthal v St
72 Wis. 2d 740 (1976)

5. Preliminary Procedure for Examining Petition

A. Generally

1) Ct first examines petitioner's motion and record before granting any hearing

§ 974.06(3)
Smith v St
60 Wis. 2d 373 (1973)

a. Intended to be prescreening procedure fair to both petitioner and Ct

Levesque v St
63 Wis. 2d 412 (1974)

2) Ct makes threshold determination whether petitioner's motion and records of action conclusively show prisoner entitled to no relief

§ 974.06(3)
St v Carter
131 Wis. 2d 69 (1986)
Smith v St
60 Wis. 2d 373 (1973)

a. If motion and record conclusively show prisoner entitled to no relief, Ct may summarily dismiss motion without hearing

§ 974.06(3)
Smith v St
60 Wis. 2d 373 (1973)

- *See* "**Summary Dismissal,**" **Sec. 6**, *infra*

b. Otherwise, Ct may grant evidentiary hearing in its discretion

§ 974.06(3)
Sanders v St
69 Wis. 2d 242 (1975)
Smith v St
60 Wis. 2d 373 (1973)

- *See* "**Granting a Hearing,**" **Sec. 7**, *infra*, and
- *See* "**Hearing Procedures,**" **Sec. 8**, *infra*

c. If issue purely legal, motion may be considered on briefs, with or without hearing

B. Appointment of amicus curiae

Smith v St
60 Wis. 2d 373 (1973)
Peterson v St
54 Wis. 2d 370 (1972)

1) Ct may appoint Atty as amicus curiae to study Def's motion and records

Holmes v St
63 Wis. 2d 389 (1974)

a. CAUTION: Ct should not appoint members of prosecutor's staff

Smith v St
60 Wis. 2d 373 (1973)
Peterson v St
54 Wis. 2d 370 (1972)

2) Amicus curiae reports to Ct whether Def's motion and records do or do not conclusively show Def entitled to no relief

Smith v St
60 Wis. 2d 373 (1973)
Peterson v St
54 Wis. 2d 370 (1972)

3) Amicus curiae Atty's conclusions not conclusive

a. Merely assists Ct in arriving at own independent judgment

b. Ct may not "rubber-stamp" amicus curiae Atty's conclusions

C. Independent judicial inquiry required

Smith v St
60 Wis. 2d 373 (1973)

1) Ct must independently examine Def's motion and record

Smith v St
60 Wis. 2d 373 (1973)
Peterson v St
54 Wis. 2d 370 (1972)

2) Ct must itself make final decision on merits of Def's motion

6. Summary Dismissal

A. Standard for determination

§ 974.06(3)
Smith v St
60 Wis. 2d 373 (1973)

1) If Def's motion and record conclusively show Def entitled to no relief, Ct may summarily dismiss motion without hearing

Bergenthal v St
72 Wis. 2d 740 (1976)

a. Summary dismissal within Ct's discretion

Zuehl v St
69 Wis. 2d 355 (1975)

2) Sec. 974.06 petition to be liberally construed in determining whether Def's motion has arguable merit

B. Grounds for summary dismissal

Rohl v St
96 Wis. 2d 621 (1980)

1) Motion fails to allege sufficient facts to raise question of fact

Recommendation

a. If original petition inadequate, allow Def to supplement or amend motion

Recommendation

- Dismiss if Def still unable to allege sufficient facts

Rohl v St
96 Wis. 2d 621 (1980)
St v Flores
158 Wis. 2d 636
(Ct. App. 1990)

2) Motion presents only conclusory allegations

Levesque v St
63 Wis. 2d 412 (1974)

a. Statement of ultimate facts that may be sufficient to sustain complaint against demurrer not sufficient for § 974.06 motion

Zuehl v St
69 Wis. 2d 355 (1975)

b. Mere recital of legal grounds on which postconviction relief premised presents only conclusory allegations

Rohl v St
96 Wis. 2d 621 (1980)
Levesque v St
63 Wis. 2d 412 (1974)
St v Flores
158 Wis. 2d 636
(Ct. App. 1990)

- Def cannot stand on such conclusory allegations, hoping to supplement them at hearing

Levesque v St
63 Wis. 2d 412 (1974)
Nelson v St
54 Wis. 2d 489 (1972)

c. If Def alleges facts that, if true, would entitle Def to relief, Ct must hold evidentiary hearing

Zuehl v St
69 Wis. 2d 355 (1975)
Levesque v St
63 Wis. 2d 412 (1974)

- Same test as for motion to withdraw guilty plea

Recommendation

d. If original petition inadequate, allow Def to supplement or amend motion

Recommendation

- Dismiss if Def still unable to recite facts in support of allegations

§ 974.06(1)
Jessen v St
95 Wis. 2d 207 (1980)

3) Def not "a prisoner in custody under sentence of a court"

St v Theoharopoulos
72 Wis. 2d 327 (1976)
St v Bell
122 Wis. 2d 427
(Ct. App. 1984)

a. Ct has no subject-matter jurisdiction to hear Def's motion

- *See* "**Conditions Precedent**," **Sec. 2**, *supra*

Recommendation

b. Lack of custody is ground for dismissal better dealt with at hearing

St v Redmond
203 Wis. 2d 13
(Ct. App. 1996)

4) Def has failed to exhaust available direct remedies

§ 974.06(1)

a. Time for appeal or other postconviction remedies under § 974.02 not expired

Peterson v St
54 Wis. 2d 370 (1972)

b. Def still has time to

- Make motion for new trial, and
- Appeal

§ 974.06(1)
Comment
St v Walberg
109 Wis. 2d 96 (1982)

c. Ct has no subject-matter jurisdiction to entertain motion until Def's conviction finalized and direct remedies exhausted

5) Def raising issues not cognizable under § 974.06

a. *See* "**Purpose**" and "**Scope**," in **Sec. 1**, *supra*

6) Def previously waived grounds for relief now asserted

§ 974.06(4)

a. During proceeding that resulted in Def's conviction or sentence, including

- Entering guilty plea
- Trial

§ 974.06(4)

b. During any other proceeding Def has taken to secure relief, including

- Motion for new trial
- Direct appeal
- Prior § 974.06 motions

— Motion for sentence modification does not bar subsequent § 974.06 motion

St v Starks
2013 WI 69, ¶ 46
349 Wis. 2d 274
modified in part on other grounds by St ex rel Warren v Meisner
2020 WI 55
392 Wis. 2d 1

§ 974.06(4)

c. If Def does not raise all grounds for relief in first § 974.06 motion, such grounds are waived as basis for subsequent § 974.06 motions, unless

§ 974.06(4)

- Ct finds ground for relief asserted that for sufficient reason was not asserted earlier, or

§ 974.06(4)

- Ct finds ground for relief asserted that for sufficient reason was inadequately raised earlier

Bergenthal v St
72 Wis. 2d 740 (1976)
overruled in part by St v Escalona-Naranjo
185 Wis. 2d 168 (1994)

d. Issues of "constitutional dimension" not waived, even though Def did not raise such issues in

- Motion for new trial
- Prior § 974.06 motions

St v Braun
185 Wis. 2d 152 (1994)

e. Because of escape status at time of original motion

Recommendation

f. Whether Def waived ground for relief now asserted is better dealt with at hearing

St v Allen
2010 WI 89
328 Wis. 2d 1
St v Lo
2003 WI 107
264 Wis. 2d 1
St v Escalona-Naranjo
185 Wis. 2d 168 (1994)

7) Motion raises issues that should have been raised on direct appeal, on motion for new trial, or in response to a no-merit report, unless

§ 974.06(4)
St v Klimas
94 Wis. 2d 288
(Ct. App. 1979)

a. Ct finds ground for relief asserted that for sufficient reason was not asserted earlier, or

§ 974.06(4)
St v Tolefree
209 Wis. 2d 421
(Ct. App. 1997)

b. Ct finds ground for relief asserted that for sufficient reason was inadequately raised earlier

St v Love
2005 WI 116
284 Wis. 2d 111

St v Escalona-Naranjo
185 Wis. 2d 168 (1994)

Loop v St
65 Wis. 2d 499 (1974)

St v Klimas
94 Wis. 2d 288
(Ct. App. 1979)

St ex rel Warren v Meisner
2020 WI 55
392 Wis. 2d 1
St v Romero-Georgana
2014 WI 83
360 Wis. 2d 522
St v Hensley
221 Wis. 2d 473
(Ct. App. 1998)
St v Robinson
177 Wis. 2d 46
(Ct. App. 1993)

St v Romero-Georgana
2014 WI 83
360 Wis. 2d 522

Smith v St
60 Wis. 2d 373 (1973)

Nelson v St
54 Wis. 2d 489 (1972)

8) Ineffective assistance of trial counsel

   a. Claim not allowed if it could have been raised in previously filed motion under § 974.02 or direct appeal

   b. Ineffective assistance can be raised if no previously filed § 974.02 or direct appeal motion

   c. However, § 974.06(4) does not exempt a constitutional issue from this limitation unless Ct finds a "sufficient reason" for failure to allege matter in earlier motion

9) Petition by appellate counsel to challenge failure of postconviction counsel to raise ineffective assistance of trial counsel should be filed in Trial Ct

   a. Prior § 974.06 petition does not preclude a second petition alleging ineffective assistance of trial and appellate counsel, if Def was represented by same Atty at trial and on appeal

   b. When same Atty represents Def at trial and on appeal, Atty's inability to assert own ineffectiveness is a "sufficient reason" under § 974.06(4)

   c. Def who alleges that postconviction counsel was ineffective for failing to bring certain claims must demonstrate that those claims are clearly stronger than the claims postconviction counsel actually brought

C. Ct must make detailed record on summary dismissal

1) Ct must issue written opinion supporting decision

2) Opinion must show that Ct independently reviewed Def's motion and records

Smith v St
60 Wis. 2d 373 (1973)

a. "Sufficient particularity" is standard

Smith v St
60 Wis. 2d 373 (1973)

b. When Def claims multiple grounds for relief, particularized rulings as to each required

Smith v St
60 Wis. 2d 373 (1973)

c. Formal findings of fact and conclusions of law may be unnecessary

- As when Def presented only conclusory allegations in motion

D. Notice to Def of right to appeal

Recommendation
St v Argiz
101 Wis. 2d 546 (1981)

1) Upon summary dismissal, Def should be given notice of right to appeal

Peterson v St
54 Wis. 2d 370 (1972)
US ex rel Singleton v Woods
440 F2d 835
(7th Cir 1971)

a. Notice has been mandated following Def's conviction, but not yet mandated following summary dismissal of § 974.06 motion

7. Granting a Hearing

A. Standard for granting hearing

St v Allen
2004 WI 106
274 Wis. 2d 568

1) Ct has discretion to deny motion without hearing if

a. Motion fails to provide sufficient material facts—who, what, where, when, why, and how—that, if true, would entitle to Def to relief requested, and

b. Ct's review of record conclusively demonstrates that Def is not entitled to relief

St v Love
2005 WI 116, ¶ 29 n10
284 Wis. 2d 111

2) Motion should be liberally construed in determining whether it has arguable merit

Smith v St
60 Wis. 2d 373 (1973)

3) Ct may order hearing only as to some issues raised and summarily dismiss others

B. Ct serves notice on DA

§ 974.06(3)(a)

1) Ct to cause service of copy of Def's motion on DA

§ 974.06(3)(a)

a. Ct orders written response within fixed, reasonable time

2) Upon DA's response, Ct may

a. Find that Def's motion and records, together with DA's response, now conclusively show Def entitled to no relief, and

b. Summarily dismiss Def's motion

- See "**Summary Dismissal**," **Sec. 6**, *supra*

C. Ct determines whether Atty necessary for Def

Recommendation

1) Necessity of counsel within discretion of Ct

a. Indigent's right to counsel on postconviction motions not yet mandated

Recommendation

b. If evidentiary hearing ordered, Ct should find counsel necessary

§ 974.06(3)(b)

2) Ct to refer Def to SPD for indigency determination and appointment of counsel, provided

Recommendation

a. Def wishes to be represented by Atty, and

§ 974.06(3)(b)

b. Def claims or appears to be indigent, and

§ 974.06(3)(b)

c. Ct determines counsel necessary upon review of

- Def's motion and records
- DA's response

§ 974.06(3)(c)

D. Ct schedules prompt hearing

E. Ct determines if Def's presence required at hearing

§ 974.06(5)

1) Ct may entertain and determine Def's motion without requiring production of Def at hearing

Sanders v St
69 Wis. 2d 242 (1975)

a. Presence of Def at hearing within discretion of Ct

§ 974.06(5)

b. Motion may be heard by telephone in Ct's discretion under § 807.13

2) Guidelines for Ct's determination

Sanders v St
69 Wis. 2d 242 (1975)
WSA, § 974.06 –Judicial Council Note, 1969

a. If hearing is evidentiary hearing, Def must be present when

- Substantial issue of fact presented, and
- Issue supported beyond mere allegation

St v Saunders
196 Wis. 2d 45
(Ct. App. 1995)

Sanders v St
69 Wis. 2d 242 (1975)

b. If Def represented by counsel, Def need not be present when

- Only issues of law raised, or
- No substantial issues of fact raised

Recommendation

c. If Def not represented by counsel, Def should be present at any hearing

3) If Def's presence necessary, Ct should issue writ of habeas corpus *ad testificandum* to obtain Def's presence

8. Hearing Procedures

A. Scope of hearing

1) Ct determines scope of hearing

Sanders v US
83 SCt 1068 (1963)
Sanders v St
69 Wis. 2d 242 (1975)

a. Ct has discretion to determine whether Def's claim substantial before granting full evidentiary hearing

Smith v St
60 Wis. 2d 373 (1973)

b. Ct may order hearing as to particular issues raised by Def's motion, and deny hearing as to others

St v Rohl
104 Wis. 2d 77
(Ct. App. 1981)

2) Ct not bound by previous trial proceedings

St v Carter
131 Wis. 2d 69 (1986)

a. Ct may receive evidence and try issues anew

B. Burden of proof

§ 974.06(6)

1) Sec. 74.06 proceedings civil in nature

§ 974.06(6)
St v Walberg
109 Wis. 2d 96 (1982)

2) Burden on Def to overcome finality of criminal conviction

St v Walberg
109 Wis. 2d 96 (1982)
St v Flores
158 Wis. 2d 636
(Ct. App. 1990)

3) Def must show by clear and convincing evidence that Ct

a. Rendered judgment without jurisdiction, or

b. Denied Def constitutional rights, which render judgment vulnerable to collateral attack, or

c. Imposed sentence not authorized by law, or

d. Imposed sentence otherwise subject to collateral attack

C. Adjudication

§ 974.06(3)(d)
Smith v St
60 Wis. 2d 373 (1973)

1) Ct must make formal findings of fact and conclusions of law

§ 974.06(3)(d)

2) Def must be granted relief, if Ct finds

a. Judgment rendered without jurisdiction

b. Sentence imposed not authorized by law

c. Def denied certain constitutional rights so as to render judgment vulnerable to collateral attack

d. Sentence imposed otherwise subject to collateral attack

3) Def may be denied relief, when Ct finds

St v Sharlow
106 Wis. 2d 440
(Ct. App. 1982), *aff'd*,
110 Wis. 2d 226 (1983)

a. Error harmless beyond a reasonable doubt

St v Walberg
109 Wis. 2d 96 (1982)
Rohl v St
90 Wis. 2d 18
(Ct. App. 1979)
rev'd on other grounds by
96 Wis. 2d 621 (1980)

b. Def failed to prove claims by clear and convincing evidence

§ 974.06(3)(d)
St v Johnson
101 Wis. 2d 698
(Ct. App. 1981)

4) Ct's discretion to fashion relief strictly limited by statutory language

§ 974.06(3)(d)

5) Forms of relief available

a. Vacate and set aside judgment

- Discharge Def

Comment

§ 974.06(3)(d)

b. Grant Def new trial

c. Correct Def's sentence as appropriate

d. Resentence Def

D. Notice to Def of right to appeal

Recommendation
St v Argiz
101 Wis. 2d 546 (1981)

1) Upon final disposition of § 974.06 motion, Def should be given notice of right to appeal

Peterson v St
54 Wis. 2d 370 (1972)
US ex rel Singleton v Woods
440 F2d 835
(7th Cir 1971)

a. Notice mandated following Def's conviction, but not yet mandated following final disposition of § 974.06 motion

9. Appeal

§ 974.06(7)

A. Def may appeal from order entered on motion as from final judgment, including

1) Order summarily dismissing entire motion, or portions of motion

2) Order denying relief after hearing

3) Order granting relief after hearing

§ 974.02
§ 809.30
§ 809.40

B. Time constraints for appeal are same as in civil case

1) *See also* **CR 40, Sec. 1**

CR 43: WITHDRAWAL OF PLEA

1. Withdrawal of Plea Based on Breach of Plea Agreement ..... CR 43-1
2. Withdrawal of Plea Before Sentencing or After Sentence Vacated ..... CR 43-3
3. Withdrawal of Plea of Guilty or No Contest After Sentencing ..... CR 43-4

Santobello v New York
92 S. Ct. 495 (1971)

1. Withdrawal of Plea Based on Breach of Plea Agreement

St v Bowers
2005 WI App 72
280 Wis. 2d 534

A. Either party entitled to withdraw from plea agreement if other party breaches

1) Breach must be material and substantial

St v Bokenyi
2014 WI 61, ¶ 40
355 Wis. 2d 28

a. A material and substantial breach is one that violates the terms of the agreement and defeats a benefit for the nonbreaching party

St v Nietzold
2023 WI 22
406 Wis. 2d 349

b. Corrected misstatement is not such a breach

St v Stewart
2013 WI App 86, ¶¶ 18–19, 349 Wis. 2d 385

c. Prosecutor need not disavow victim's differing sentence recommendation

St v Stewart
2013 WI App 86, ¶ 15
349 Wis. 2d 385
St v Matson
2003 WI App 253, ¶ 26
268 Wis. 2d 725

d. "State" includes investigating officer, but not when officer is a victim

St v Smith
207 Wis. 2d 258, 281 (1997)
St v Matson
2003 WI App 253, ¶ 27
268 Wis. 2d 725

e. Prejudice is presumed when material and substantial breach

St v Deilke
2004 WI 104, ¶ 13
274 Wis. 2d 595

f. Burden on party asserting breach by clear and convincing evidence

St v Tourville
2016 WI 17, ¶ 36
367 Wis. 2d 285

g. To establish a breach, a party must establish that item was bargained for in the plea agreement; a plea agreement silent on a topic such as concurrent/ consecutive sentences is not breached by a consecutive sentence

St v Williams
2002 WI 1
249 Wis. 2d 492

2) Prosecutor may not render less than a neutral recitation of plea agreement

St v Fortes
2015 WI App 25, ¶¶ 23–25, 361 Wis. 2d 249

3) Breach of plea agreement waived if issue not raised before Def sentenced

St v Neuaone
2005 WI App 124
284 Wis. 2d 473

4) Agreement to withhold relevant information from Ct is contrary to public policy; disclosure of such information is not breach

St v Keed
2013 WI App 132, ¶¶ 7, 12, 351 Wis. 2d 517

5) Remedy is in Circuit Ct's discretion: not every breach requires a remedy; breach must deprive the nonbreaching party of a material and substantial benefit for which the party bargained

B. Under some circumstances, party who has breached may not be permitted to withdraw

St v Toliver
187 Wis. 2d 346
(Ct. App. 1994)

St v Deilke
2004 WI 104, ¶ 25
274 Wis. 2d 595
St v Bembenek
2006 WI App 198
296 Wis. 2d 422

1) Remedy depends on totality of circumstances—whether to vacate plea, reinstate original offer, or both

St v Bokenyi
2014 WI 61, ¶ 40
355 Wis. 2d 28
St v Deilke
2004 WI 104, ¶¶ 14, 25
274 Wis. 2d 595

2) Material and substantial breach is one that violates the terms of the agreement and defeats a benefit for the nonbreaching party. It is manifest injustice

St v Rivest
106 Wis. 2d 406, 414
(1982)

C. Party seeking to vacate agreement must establish fact of breach and that breach was sufficiently material to warrant releasing party, whether prosecution or defense, from its promise

St v Tucker
2012 WI App 67, ¶¶ 13–14, 342 Wis. 2d 224

1) Evidentiary hearing required to determine whether breach occurred and whether breach is material, if there is a dispute as to either issue

2. Withdrawal of Plea Before Sentencing or After Sentence Vacated

St v McKnight
65 Wis. 2d 582 (1974)

A. Def has no absolute right to withdraw plea before sentencing

Dudrey v St
74 Wis. 2d 480 (1976)
St v Simpson
200 Wis. 2d 798
(Ct. App. 1996)

1) Motion directed to sound discretion of Ct

Nelson v St
54 Wis. 2d 489, 496
(1972)

2) Evidentiary hearing to be granted liberally

St v Lopez
2014 WI 11, ¶ 2
353 Wis. 2d 1
St v Canedy
161 Wis. 2d 565 (1991)

3) Ct should freely allow Def to withdraw plea before sentencing for any fair and just reason, unless the prosecution would be substantially prejudiced

St v Leitner
2001 WI App 172
247 Wis. 2d 195
aff'd on other grounds
2002 WI 77
253 Wis. 2d 449

a. Freely does not mean automatically and requires a showing of some adequate reason for Def's change of heart other than desire to have a trial

b. See Recantation, **Sec. 3.B.2**)f., *infra*

St v Nash
2020 WI 85, ¶ 31
394 Wis. 2d 238

c. Burden of proof on Def by preponderance of evidence

St v Bollig
2000 WI 6
232 Wis. 2d 561

4) Once Def has presented a fair and just reason for plea withdrawal, burden shifts to State to demonstrate substantial prejudice to defeat plea withdrawal

St v Cooper
2019 WI 73, ¶¶ 28–29
387 Wis. 2d 439

5) Lawyer's violation of professional conduct rules is not necessarily a basis for withdrawal of plea on ground of ineffective assistance of counsel

St v Marinez
2008 WI App 105
¶¶ 4, 13–14,
313 Wis. 2d 490

B. Ct may advise Def that Ct intends to exceed the plea recommendation, and will permit withdrawal of Def's plea

3. Withdrawal of Plea of Guilty or No Contest After Sentencing

Pulaski v St
23 Wis. 2d 138 (1964)

A. Ct has inherent power to hear motion to permit withdrawal of plea

1) Motion directed to sound discretion of Ct

St v Reppin
35 Wis. 2d 377 (1967)

2) Issue not whether Def guilty, but whether Def fairly convicted on plea

St v Bartelt
112 Wis. 2d 467 (1983)

3) Plea is involuntary as matter of law when record does not show that Def

St v Van Camp
213 Wis. 2d 131 (1997)
St v Harrell
182 Wis. 2d 408
(Ct. App. 1994)

a. Was fully informed of all rights waived, and

b. Had ability to comprehend

St v Kelty
2006 WI 101
294 Wis. 2d 62

4) Multiplicity claim is lost when Def enters knowing, voluntary, and intelligent guilty plea. Viable claim must be based on the record

B. Withdrawal on grounds of manifest injustice

St v Carlson
2014 WI App 124,
¶¶ 24–25
359 Wis. 2d 123

1) Def must show by clear and convincing evidence plea is not voluntarily and knowingly entered, and

St v Brown
2006 WI 100, ¶ 18
293 Wis. 2d 594

a. Withdrawal of plea necessary to prevent manifest injustice

b. Review not limited to plea transcript

St v Cain
2012 WI 68, ¶ 31
342 Wis. 2d 1

St v Hudson
2013 WI App 120, ¶¶ 11–12, 351 Wis. 2d 73

2) Manifest injustice may be shown when

a. Def denied effective assistance of counsel

St v Harper
57 Wis. 2d 543, 557
(1973)

- Standard of review is whether Def given representation equal to that which ordinarily prudent lawyer, skilled and versed in criminal law, would give to clients who privately retained Atty's service

Padilla v Kentucky
130 S. Ct. 1473, 1485–86
(2010)
St v Ortiz-Mondragon
2015 WI 73
364 Wis. 2d 1
St v Shata
2015 WI 74
364 Wis. 2d 63
St v Mendez
2014 WI App 57, ¶ 12
354 Wis. 2d 88

- Defense Atty's failure to warn Def of immigration consequences of plea

St v LeMere
2016 WI 41, ¶ 69
368 Wis. 2d 624

- Sixth Amendment guarantee of effective counsel does not require advice of potential Ch 980 proceedings, a collateral consequence

St v Cooper
2019 WI 73, ¶¶ 28–29
387 Wis. 2d 439

- Lawyer's violation of professional conduct rules is not necessarily a basis for withdrawal of plea on ground of ineffective assistance of counsel

St v Henyard
2020 WI App 51,¶¶ 16,
19, 393 Wis.2d 727

- Def Atty previously serving as Comm'r in case not basis for withdrawal unless actual conflict adversely affected representation, as shown by clear and convincing evidence

- *See* **Ineffective Assistance of Counsel, CR 41**

b. Plea was not entered or ratified by Def or person authorized to act in Def's behalf

Kruse v St
47 Wis. 2d 460 (1970)
St v Salentine
206 Wis. 2d 419
(Ct. App. 1996)

- Ground does not exist when plea entered and ratified by Def in open Ct while represented by counsel

St v Freland
2011 WI App 80, ¶ 29
334 Wis. 2d 772

c. Plea was involuntary, without knowledge that conduct to which Def pleaded guilty does not fall within charged offense or that sentence actually imposed could be imposed

St v Bangert
131 Wis. 2d 246 (1986)

- Mere inadequacy of plea colloquy does not by itself necessitate withdrawal of plea; reviewing Ct may look to entire record to determine whether Def had actual notice of nature of charge

St v Booth
142 Wis. 2d 232
(Ct. App. 1987)

- Mere disappointment in eventual punishment imposed not ground for withdrawal of guilty plea nor is assertion of innocence

Craker v St
66 Wis. 2d 222 (1974)

- Moral scruples or family pressure to plead guilty are self-coercive elements and do not vitiate voluntary nature of guilty plea

St v Finley
2016 WI 63
370 Wis. 2d 402
St v Dillard
2014 WI 123, ¶ 69
358 Wis. 2d 543
St v Taylor
2013 WI 34, ¶ 33 & n.8
347 Wis. 2d 30

- Misunderstanding of consequences of plea is ground for withdrawal, but must prove actual misunderstanding

St v Cross
2010 WI 70, ¶ 4
326 Wis. 2d 492
St v Lichty
2012 WI App 126
344 Wis. 2d 733

- Entering a plea with an understanding that the maximum sentence is higher than the law allows, but not substantially higher, does not vitiate the plea

St v Hailes
2023 WI App 29
408 Wis. 2d 465
pet for rev denied

- Erroneous application of penalty enhancers to drug charges did not warrant plea withdrawal when considering the totality of the circumstances

Edwards v St
51 Wis. 2d 231 (1971)

- If Def knows which constitutional rights are waived by plea, Def cannot withdraw plea because each right not specifically waived

d. Def did not receive concessions contemplated by plea agreement and prosecutor failed to seek concessions as promised

Santobello v New York
92 S. Ct. 495 (1971)
St v Rivest
106 Wis. 2d 406, 414
(1982)
Young v St
49 Wis. 2d 361 (1971)
St v Poole
131 Wis. 2d 359
(Ct. App. 1986)

St v Frey
2012 WI 99, ¶¶ 62, 77,
102, 343 Wis. 2d 358
St v Straszkowski
2008 WI 65
¶¶ 5–6, 35, 92–94,
310 Wis. 2d 259

- Intent regarding offenses charged, uncharged read-ins, and dismissed charges as part of plea agreement should be clear

LeFebre v St
40 Wis. 2d 666 (1968)

- Def must prove what plea agreement actually was or contention fails for lack of proof

St v Bangert
131 Wis. 2d 246 (1986)

- Breach of plea agreement must deprive Def of substantial and material benefit for which Def bargained

St v Wills
187 Wis. 2d 529
(Ct. App. 1994)

- Prosecution's "half-hearted" delivery of statement could not be construed as fulfillment of promise to recommend plea

St v Williams
2000 WI 78
236 Wis. 2d 293

- Failure to receive sentence concessions contemplated by a plea agreement is not a basis for withdrawing guilty plea on grounds of manifest injustice

St v Smith
202 Wis. 2d 21 (1996)

e. *Alford* plea does not reflect factual basis for offense

f. To prevail on a claim of newly discovered evidence

St v McAlister
2018 WI 34, ¶ 31
380 Wis. 2d 684

- Def must first prove by clear and convincing evidence that
  - — Evidence was discovered after conviction
  - — Def not negligent in seeking the evidence
  - — Evidence is material to an issue in the case, and
  - — Evidence is not merely cumulative

St v McAlister
2018 WI 34, ¶ 33
380 Wis. 2d 684

- If based on recantation, Def must show corroborating evidence consisting of
  - — Feasible motive for initial false statement
  - — Circumstantial guarantees of trustworthiness of recantation

St v Allen
2004 WI 106
274 Wis. 2d 568

- Ct should review motion and determine whether each of these elements is sufficiently alleged before evidentiary hearing is required

St v Payette
2008 WI App 106
313 Wis. 2d 39

g. Failure to establish a sufficient factual basis that Def committed the pleaded offense

3) If Def meets the burden, then

a. Ct must determine whether reasonable probability exists that different result would be reached in a trial

b. Reasonable probability of a different outcome exists if there is a reasonable probability that a jury looking at the old and new evidence would have a reasonable doubt as to guilt

Lee v US
137 S. Ct. 1958, 1968–69
(2017)

c. Certainty of deportation makes Def's decision to proceed to trial rational; counsel's advice to plead guilty instead justifies plea withdrawal

4) Any other situation in which Def demonstrates manifest injustice

St v Negrete
2012 WI 92, ¶ 20
343 Wis. 2d 1
See St v Bentley
201 Wis. 2d 303 (1996)

a. If plea hearing transcript is unavailable, *Bentley*-type plea withdrawal standard governs. *See also infra* **Sec. 3.G.**

C. Withdrawal on ground of denial of constitutional rights

Hatcher v St
83 Wis. 2d 559 (1978)
Edwards v St
51 Wis. 2d 231 (1971)
St v Harris
2003 WI App 144
266 Wis. 2d 200
aff'd, 2004 WI 64
272 Wis. 2d 80
St v Sturgeon
231 Wis. 2d 487
(Ct. App. 1999)

1) To withdraw plea as matter of right, Def has burden to show

a. Violation of a relevant constitutional right, and

b. Violation caused Def to plead guilty, and

c. At time of plea, Def unaware of potential constitutional challenges to State's case because of the violation

St v Rock
92 Wis. 2d 554 (1979)

2) Ct must make findings on all three elements of Def's burden in granting or denying motions

St v Van Camp
213 Wis. 2d 131 (1997)
Edwards v St
51 Wis. 2d 231 (1971)

3) Plea cannot be invalidated on grounds that each constitutional right not specifically waived, provided

a. Def knows those constitutional rights automatically waived by guilty plea, and

b. Record shows plea knowingly and voluntarily entered

St v Bangert
131 Wis. 2d 246 (1986)

D. Withdrawal on grounds of violation of § 971.08 (acceptance of guilty pleas) or failure to follow Ct-mandated duties set forth in *Bangert*

St v Van Camp
213 Wis. 2d 131 (1997)
St v Hampton
2002 WI App 293
259 Wis. 2d 455
aff'd, 2004 WI 107
274 Wis. 2d 379

1) Initial burden on Def to make prima facie showing of violation, then Def is entitled to an evidentiary hearing

St v Howell
2007 WI 75, ¶ 27
301 Wis. 2d 350

a. Def must allege that Circuit Ct did not fulfill its plea colloquy duties

St v Finley
2016 WI 63, ¶ 39 n24
370 Wis. 2d 402

b. Def must allege he or she did not know or understand the information that should have been provided at the plea hearing

St v Johnson
2012 WI App 21, ¶¶ 12–13, 339 Wis. 2d 421

2) Small deviation from Ct's duties in plea colloquy (e.g., failing to inform Def that Ct not bound by plea agreement) does not require evidentiary hearing and is evaluated under "manifest injustice" standard

3) Burden then shifts to State to show by clear and convincing evidence that plea knowingly, voluntarily, and intelligently entered despite inadequacy of record at time of plea's acceptance

St v Lopez
196 Wis. 2d 725
(Ct. App. 1995)

a. Evidence outside plea hearing records is admissible

St v Thomas
2000 WI 13
232 Wis. 2d 714

b. Ct may look at totality of circumstances

St v Fuerte
2017 WI 104, ¶ 42
378 Wis. 2d 504

4) Ct's failure to give deportation warning under § 971.08(1)(c) is subject to the "harmless error" analysis

St v Carter
131 Wis. 2d 69 (1986)

5) Violation of § 971.08 not a constitutional violation but a statutory violation subject to postconviction motion to withdraw plea under § 974.02 or § 809.30. Alleged statutory violation is beyond scope of a § 974.06 postconviction motion

St v Finley
2016 WI 63, ¶ 95
370 Wis. 2d 402
St v Bollig
2000 WI 6, ¶ 16
232 Wis. 2d 561

6) Def may withdraw plea if not notified of all potential punishments resulting from plea

St v Muldrow
2018 WI 52, ¶ 1
381 Wis. 2d 492
St v Bollig
2000 WI 6, ¶ 16
232 Wis. 2d 561

a. Direct consequence has a definite, immediate, and largely automatic effect on range of punishment

St v LeMere
2016 WI 41, ¶ 31
368 Wis. 2d 624

b. Collateral consequences are those that "do not flow from the conviction" but are imposed by another tribunal

St v Fugere
2019 WI 33
386 Wis. 2d 76
St v Muldrow
2018 WI 52, ¶ 1
381 Wis. 2d 492

c. Use intent-effects test to determine whether consequence is direct or collateral

E. Review of voluntariness of plea bargain

St v Rodriguez
221 Wis. 2d 487
(Ct. App. 1998)

1) Def's unreasonable mistaken belief of own citizenship does not entitle Def to reopen plea

Seybold v St
61 Wis. 2d 227 (1973)

2) When reviewing voluntariness of plea bargain, Ct must distinguish between

   a. Motivation that induces Def to plead guilty or no contest, and

   b. Force that compels Def to plead guilty or no contest

Craker v St
66 Wis. 2d 222 (1974)

3) Self-imposed coercive elements do not vitiate voluntary nature of a guilty plea

St v Lichty
2012 WI App 126
344 Wis. 2d 733

4) Good-faith error in calculating maximum sentence at plea hearing, if later corrected at sentencing to Def's benefit, does not affect voluntariness

St v Fugere
2019 WI 33
386 Wis. 2d 76

5) In NGI proceedings, safeguards for a valid plea only apply to the guilt phase

F. Trial Ct's power on review of motion to withdraw plea

Broadie v St
68 Wis. 2d 420, 423
(1975)
St v Johnson
105 Wis. 2d 657
(Ct. App. 1981)

1) Test of record

   a. Ct may not upset earlier findings, made in accepting plea, which provide sufficient basis to support plea, unless findings appear on review to be contrary to great weight and clear preponderance of evidence

Birts v St
68 Wis. 2d 389, 395–96
(1975)

2) Ct not bound to accept parties' stipulation to re-open plea

   a. When Def moves for withdrawal of plea, Ct not bound to accept prosecutor's and Def's stipulation as to mistaken basis for Def's plea

   b. Plea bargain process involves the public interest and truth should be found by trier of fact

St v Pohlhammer
82 Wis. 2d 1 (1978)

3) Withdrawal of pleas to charges barred by statutes of limitation

a. Def may withdraw plea of guilty upon motion to Ct, when

- Def pleaded guilty pursuant to plea bargain based on amended information, and
- Amended information charged new and different offense, which on its face was barred by applicable statute of limitation

G. Granting an evidentiary hearing

Nelson v St
54 Wis. 2d 489, 496 (1972)

1) Ct's discretion to grant evidentiary hearing

St v Hampton
2004 WI 107, ¶ 51
274 Wis. 2d 379
See St v Bangert
131 Wis. 2d 246 (1986)

a. Under *Bangert*, for assertion of failure to follow § 971.08, after Def establishes prima facie case

St v Hampton
2004 WI 107
¶¶ 51, 60, 63
274 Wis. 2d 379
See St v Bentley
201 Wis. 2d 303 (1996)

b. Under *Bentley*, after Ct determines that Def alleges facts that if true would entitle Def to relief

St v Howell
2007 WI 75
301 Wis. 2d 350

c. *Bangert* and *Bentley* are not inconsistent, and Def may bring dual motion under both cases. Ct should consider each alleged ground for the dual motion and may grant an evidentiary hearing on either ground

Nelson v St
54 Wis. 2d 489 (1972)

2) Basis for granting hearings

St v Bentley
201 Wis. 2d 303 (1996)
Peterson v St
54 Wis. 2d 370, 380 (1972)

a. If motion to withdraw guilty plea after judgment and sentence alleges facts that, if true, would entitle Def to relief, Ct must hold evidentiary hearing

St v Allen
2004 WI 106, ¶ 23
274 Wis. 2d 568

b. To meet *Bentley* standard, party must allege within the four corners of the motion who, what, where, when, why, and how

Levesque v St
63 Wis. 2d 412 (1974)
Nelson v St
54 Wis. 2d 489 (1972)
St v Washington
176 Wis. 2d 205
(Ct. App. 1993)

c. Evidentiary hearing not required when

- Def fails to allege sufficient facts in motion to raise question of fact, or
- Def presents only conclusory allegations, or
- Record conclusively demonstrates that Def not entitled to relief

Nelson v St
54 Wis. 2d 489 (1972)

3) Ct may, in its discretion, deny motion without a hearing, provided

a. Ct forms independent judgment after reviewing record and pleadings, and

b. Ct supports decision with written opinion

St v Hampton
2004 WI 107
¶¶ 60, 62, 63
274 Wis. 2d 379

4) Burden of proof

a. In *Bangert*-type motions, if Def presents prima facie case based on plea record, then burden shifts to State to show clear and convincing evidence that plea was knowing, voluntary, and intelligently made

b. In *Bentley*-type motions, if Def establishes prima facie case for an evidentiary hearing (usually allegations arise outside of record), then at hearing must prove by clear and convincing evidence all elements of alleged error, and the linkage between error and plea, which must amount to manifest injustice

CR 44
EXTRADITION/DETAINERS

EXTRADITION ..... **CR 44-3**

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EXTRADITION

US Const art IV, § 2
18 USC § 3182

1. Nature and Purpose of Proceedings

A. Surrender on demand by Governor of one State to Governor of another of person charged with or convicted of offense in demanding State

B. To prevent escape of person charged with or convicted of offense and to provide for return to jurisdiction from which person fled from prosecution or punishment

St ex rel Ehlers v Endicott
188 Wis. 2d 57
(Ct. App. 1994)

C. Purpose of extradition is to provide a summary and mandatory proceeding

2. Controlled by Federal Law

A. Federal extradition law

Michigan v Doran
99 SCt 530 (1978)

1) Prescribes procedure to be followed by demanding and asylum States

Mahon v Justice
8 SCt 1204 (1888)

2) Not to be construed to afford any person privilege or immunity or right of asylum in State to which fled

St v Stone
111 Wis. 2d 470 (1983)

3) Wis follows mandates of US Supreme Ct in extradition proceedings

976.03

B. Uniform Criminal Extradition Act

St ex rel Foster v Uttech
31 Wis. 2d 664 (1966)

1) Legislation adopted by States ancillary to and in aid of federal Constitution and law

Appleyard v Massachusetts
27 SCt 122 (1906)

2) Federal regulations to be liberally construed to effectuate purpose of returning fugitives

St v Hughes
68 Wis. 2d 662 (1975)
S Carolina v Bailey
53 SCt 667 (1933)
US ex rel Grano v Anderson
318 FS 263 (D Del 1970)
aff'd, 446 F2d 272
(3d Cir 1971)

3) State law cannot set tougher standards for surrender of prisoners than those provided by federal law

976.03(13)–(17)

3. Arrest Before Governor's Warrant or Requisition

A. Requirements for lawful arrest

976.03(13)

1) Arrest with fugitive warrant

a. Warrant issued by Judge on complaint and affidavit of credible person that Def committed crime in another State or is fugitive from justice

St v Hughes
68 Wis. 2d 662 (1975)

b. Complaint must state sufficient facts to establish probable cause that fugitive charged with crime in another State

- Need not show probable cause that crime charged committed by Def

St v Hughes
68 Wis. 2d 662 (1975)

c. Complaint need not show, on its face, the source and reliability of facts alleged on information and belief if such showing made to Judge before issuance of warrant

976.03(14)

2) Arrest without fugitive warrant

a. May be made by officer or private citizen upon reasonable information that Def charged in another State with crime punishable by death or imprisonment for term exceeding one year

Recommendation

- Reasonable information may consist of certified copy of criminal complaint and arrest warrant or telephonic or telegraphic communication from law enforcement officer or DA

St v Klein
25 Wis. 2d 394 (1964)

b. May be made by person having probable cause to believe felony committed in demanding State and Def committed it

St v Hughes
68 Wis. 2d 662 (1975)

c. Def must be taken before a Judge with all practicable speed and complaint made setting forth grounds for arrest

- Unreasonable detention without Ct appearance raises due-process questions
- Reasonableness of delay determined from all facts and circumstances

B. Initial appearance to await requisition

976.03(15)

1) Ct must determine

a. Is Def here same as one charged?

b. Is Def fugitive from justice, or has Def committed act that constitutes crime in demanding State?

2) If foregoing questions answered affirmatively

976.03(15)

a. Def may be committed to Cty jail not to exceed 30 days to await Governor's warrant, or

b. Def may be released on bail, unless

976.03(16)

- Def charged with crime punishable by death or life imprisonment in demanding State

976.03(17)

3) Commitment or bail may be extended up to 60 days if Governor's warrant not received

St ex rel Ehlers v Endicott
188 Wis. 2d 57
(Ct. App. 1994)
St ex rel Miller v Columbia Cty Sheriff
128 Wis. 2d 479
(Ct. App. 1986)

a. If Def also held on local charges, above time limits not controlling and only begin to run after detention on local charges ended

976.03(27)

C. Waiver of extradition hearing

1) If arrest based on other than Governor's warrant, Def may sign written waiver to extradition at any time in presence of Judge

2) Ct must advise Def of right to

a. Counsel, and if indigent, right to Ct-appointed counsel

b. Issuance and service of warrant by Governor

c. Test warrant by habeas corpus hearing

Recommendation

3) Advise Def on record and make such inquiry of Def to establish waiver to be intelligent and voluntary

4) Copies of waiver distributed to following

976.03(27)(b)

a. Governor's office

976.03(27)(b)

b. Agent of demanding State

Recommendation

c. Def

Recommendation

d. Copy retained by Ct for record

4. Arrest Under Governor's Warrant or Requisition

976.03(3)

A. Form of demand

1) Governor will not recognize demand unless in writing

2) Demand must allege

976.03(3)

a. Def present in demanding State at time alleged crime committed

976.03(6)

- Constructive presence sufficient if Def commits act in Wis that intentionally results in crime in demanding State

976.03(3)

b. Def thereafter fled from demanding State

976.03(3)

3) Demand must be accompanied by

a. Authenticated copy of indictment, or

b. Authenticated copy of information supported by affidavit stating underlying facts, or

c. Authenticated copy of affidavit made before magistrate, together with copy of any warrant issued thereon, or

St ex rel Clayton v Wolke
69 Wis. 2d 363 (1975)

- Cross-certification by Clerk of Ct not required

d. Authenticated copy of judgment of conviction or sentence with statement of executive authority of demanding State that Def escaped from confinement, or broke terms of parole, probation, extended supervision, or bail

St ex rel Rodencal v Fitzgerald
164 Wis. 2d 411
(Ct. App. 1991)

- Governor's warrant sufficient so long as Governor authenticates supporting documents, and in absence of showing by Def that charging documents spurious

976.03(4)

B. Asylum State Governor may investigate case

1) Governor may ask AG or any DA to investigate or assist in investigation and report circumstances of Def and whether Def should be surrendered

976.03(7)

C. Issuance of warrant

1) Warrant must be signed by Governor and sealed with State seal

2) Must substantially recite facts necessary to validity of issuance